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No. 08-656

In the Supreme Court of the United States

TERESA JEZIERSKI,

Petitioner,

v.

MICHAEL B. MUKASEY,
Attorney General of the United States

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the jurisdiction-stripping provision of the Immigration and Nationality Act (INA), which bars judicial review of "any * * * decision or action of the Attorney General * * * the authority for which is specified under this subchapter to be in [his] discretion," 8 U.S.C. § 1252(a)(2)(B)(ii), permit the Attorney General himself to preclude judicial review by declaring certain decisions discretionary by administrative regulation?

2. If so, does the INA's jurisdiction-restoring provision, which directs that "[n]othing in [the jurisdiction-stripping provision] shall be construed as precluding [judicial] review of constitutional claims or questions of law, " 8 U.S.C. § 1252(a)(2)(D), allow the courts of appeals to review mixed questions of law and fact or only questions of pure law?

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Seventh Circuit (App., *infra*, 1a-10a) is reported at 543 F.3d 886. The opinions of the Board of Immigration Appeals denying petitioner's motion to reopen (App., *infra*, 11a-13a) and denying petitioner's administrative appeal (App., *infra*, 14a-17a) are unreported. The official oral order of the Immigration Judge denying petitioner a hardship waiver (App., *infra*, 18a-30a) and the unofficial written summary of that order (App., *infra*, 31a-35a) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 2008. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 242(a)(2)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1252(a)(2)(B), provides, in relevant part:

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment,

> decision, or action is made in removal proceedings, no court shall have jurisdiction to review–(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

Section 242(a)(2)(D) of the Immigration and Nationality Act, 8 U.S.C. § 1252(a)(2)(D), provides, in relevant part:

> Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

Section 240(c)(7)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(A), provides, in relevant part:

> An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the

> filing of one motion to reopen described in subparagraph (C)(iv).

8 C.F.R. § 1003.2(a) provides, in relevant part:

> The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board.

STATEMENT

This case concerns two issues: (1) whether the "jurisdiction-stripping" provision of the Immigration and Nationality Act, which bars judicial review of "any * * * decision * * * of the Attorney General * * * the authority for which is specified *under this subchapter* to be in [his] discretion," 8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis added), permits the Attorney General himself to preclude judicial review by declaring certain decisions discretionary by administrative regulation; and, if so, (2) whether the accompanying "jurisdiction-restoring" provision, which directs that "[n]othing in [the jurisdiction-stripping provision] shall be construed as precluding review of constitutional claims or questions of law," 8 U.S.C. § 1252(a)(2)(D), allows the courts of appeals to review mixed questions of law and fact or only questions of pure law.

A. Statutory Framework

1. The Immigration and Nationality Act (INA or the Act), 8 U.S.C. §§ 1101 *et seq.*, is the basic body of immigration law in the United States. Enacted in

1952, the INA "represent[ed] the first attempt to bring within one cohesive and comprehensive statute the various laws relating to immigration, naturalization and nationality," H.R. Rep. No. 1365, 82d Cong., 2d Sess. 1677 (1952), replacing a system rife with "[i]nequities, gaps, loopholes, and lax practices," *id.* at 1679, with one that "[s]afeguard[ed] judicial review and provid[ed] for fair administrative practice and procedure," *ibid.*

Under the INA, when the government seeks to remove (*i.e.,* deport) an individual with conditional permanent resident status, it must notify her of the proceedings in writing, allow her to secure counsel, and give her the opportunity to present evidence and cross-examine witnesses in proceedings before an immigration judge (IJ). 8 U.S.C. §§ 1229-1229a. The burden is on the government to prove "by clear and convincing evidence that * * * the alien is deportable." 8 U.S.C. § 1229a(c)(3)(A). If the IJ orders removal, the individual may appeal to the Board of Immigration Appeals (BIA). If the BIA upholds the IJ's decision, Section 242 of the Act provides for review in the courts of appeals. 8 U.S.C. § 1252(a)(5).

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009 (1996), to further "clarif[y] and streamlin[e] * * * judicial review of deportation and exclusion orders." S. Rep. No. 249, 104th Cong., 2d Sess. 14 (1996). The IIRIRA contained a "jurisdiction-stripping" provision that precluded judicial review of a series of

enumerated administrative actions, along with "any other decision * * * the authority for which is specified under this subchapter to be in the discretion of the Attorney General." 8 U.S.C. § 1252(a)(2)(B)(ii). In *INS* v. *St. Cyr*, 533 U.S. 289, 314 (2001), however, this Court limited this provision's practical effect. Noting that "some 'judicial intervention in deportation cases' is unquestionably 'required by the Constitution,'" *id.* at 300 (quoting *Heikkila* v. *Barber*, 345 U.S. 229, 235 (1953)), *St. Cyr*, which involved an adjacent subsection, 8 U.S.C. § 1952(a)(2)(C), held that district courts' traditional jurisdiction to review such actions in habeas corpus proceedings was not impaired by IIRIRA.

Congress responded by enacting the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231 (2005), which eliminated completely district court habeas review, putting in its place a regime in which courts of appeals review administrative removal decisions through petitions for review. 8 U.S.C. § 1252(b)(2).

While the 2005 law left intact IIRIRA's jurisdiction-stripping provision, it added a complementary "jurisdiction-restoring" subsection, which provided that "[n]othing in * * * any * * * provision of this chapter * * * which limits or eliminates judicial review[] shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review." 8 U.S.C. § 1252(a)(2)(D). The Act thus "give[s] every alien one day in the court of appeals, satisfying constitutional concerns" by "permit[ting] judicial

review over those issues that were historically reviewable on habeas." H.R. Rep. No. 72, 109th Cong., 1st Sess. 175 (2005).

2. Consistent with its concern for fair and efficient process, Congress has also changed the law governing reopening of removal proceedings. Although the Immigration and Naturalization Service (INS) had long recognized that immigrants were entitled to reopen removal proceedings in light of new developments and courts had reviewed such decisions, see *INS* v. *Adubu*, 485 U.S. 94, 104-105 (1988), before 1996 no INA provision specifically addressed reopening. Congress amended the INA to create a time-limited statutory right to petition to reopen. See 8 U.S.C. § 1229a(c)(7). Specifically, Section 240 allows an alien subject to removal to file "one motion to reopen proceedings." *Id.* § 1229a(c)(7)(A); see also *id.* § 1252(b)(6) (providing for judicial review of reopening denials to be consolidated with review of underlying order). Although the provision prescribes time and content guidelines, *id.* § 1229a(c)(7)(B)-(C), it does not specify the standards governing relief, nor does it address the standard or scope of judicial review of such decisions.

The Attorney General has done so, however, through administrative action. In particular, operating alongside longstanding BIA precedent governing when reopening of removal orders is appropriate, see, *e.g.*, *In re C- C-*, 23 I. & N. Dec. 899 (BIA 2006) (reopening for asylum based on change in circumstances and country conditions); *In re Velarde*,

23 I. & N. Dec. 253 (BIA 2002) (reopening for adjustment of status based on marriage entered into after commencement of removal proceedings); *In re Lozada*, 19 I. & N. Dec. 637 (BIA 1988) (reopening based on a claim of ineffective assistance of counsel), which "retain[] precedential force unless and until modified or overruled by the Attorney General," *In re E- L- H-*, 23 I. & N. Dec. 814, 817-818 (BIA 2005), stands a Justice Department regulation declaring that "[t]he decision to grant or deny a motion to reopen * * * is within the discretion of the [BIA]." 8 C.F.R. § 1003.2(a).

B. Proceedings Below

Petitioner Teresa Jezierski (née Gradzka) was born in Poland 50 years ago and lawfully entered the United States in 1993 to visit and care for her ailing uncle, who was then living in Chicago. Through her uncle, she met Zbigniew Jezierski, dated him for about a year, married him in 1994, and together they established a home in Chicago. Mr. Jezierski, a U.S. citizen, later filed an immigration petition on his wife's behalf, and she filed an application for permanent residence. In Fall 1994, the Immigration and Naturalization Service granted Ms. Jezierski conditional lawful permanent residency based on the marriage. App., *infra*, 24a.

In September 1996, Ms. Jezierski filed a Petition to Remove the Conditions of Residence (Form I-751) with the Department of Homeland Security (DHS). In 1997, while DHS was considering the petition, she divorced Mr. Jezierski after he absconded with her

car and money. R. 236, 274-276. Because the marriage, on which her permanent residency was conditioned, had ended, DHS decided she was no longer eligible for permanent residency, denied her petition, and initiated removal proceedings. R. 331-333, 339-340.

Ms. Jezierski hired attorney Daniel Rozenstrauch to represent her. R. 43. Since she had divorced, she could not file the necessary joint petition, see 8 U.S.C. 1186(a)(c)(1), to remove the marriage condition on which her continued residency rested. She could, however, ask to have that requirement waived under Section 216(c)(4), which lifts the joint petitioning requirement for, among others, aliens whose marriages were *bona fide* and those for whom removal would cause "extreme hardship." 8 U.S.C. § 1186(a)(c)(4). Rosenstrauch convinced her that her best chance to maintain lawful permanent resident status was to show that that her marriage had been *bona fide* by renewing her Form I-751 request. R. 33-37. Rozenstrauch failed, however, to advise her of her ability to file a second Form I-751 petition asserting extreme hardship as an alternative ground. Nor did he explain that failing to do so would preclude the IJ from considering that ground. During the hearing, the IJ expressed surprise that the attorney had not argued hardship and stated that Ms. Jezierski might well have fared better under a hardship defense. R. 104-105. The IJ ultimately denied Ms. Jezierski's petition. R. 152-154.

Ms. Jezierksi then retained Rozenstrauch to appeal the IJ's decision to the BIA. R. 33-37.

Rozenstrauch's BIA Notice of Appeal stated that he would file a brief. He never did so, however, and the BIA denied her appeal. App., *infra*, 12a-13a.

On August 9, 2007, Ms. Jezierski filed a Motion to Reopen pursuant to *In re Lozada*, 19 I. & N. Dec. 637 (BIA 1988), contending that Rozenstauch's performance was not minimally adequate and had seriously prejudiced her case. R. 16-27. In September, the BIA denied that motion. The Board accepted, for the sake of decision, that Rozenstauch's performance had been ineffective. App., *infra*, 12a. It concluded, however, that her motion failed on the "prejudice" prong, *i.e.*, that there was not a reasonable probability that the proceedings would have come out differently had she received minimally adequate representation. App., *infra*, 12a-13a.

Ms. Jezierski then filed a petition for review in the United States Court of Appeals for the Seventh Circuit. She argued that the attorney's incompetence had prevented her from effectively presenting her case to the IJ and the BIA, App., *infra*, 2a, thereby rendering the proceedings fundamentally unfair. She also argued that if the proceedings were reopened and she were represented by competent counsel she would be able to show that she indeed qualified for relief from removal because of "extreme hardship." Pet. C.A. Br. 10-11. The Attorney General urged the court of appeals to uphold the BIA's refusal to reopen under the "abuse of discretion" standard. Gov't C.A. Br. 15-16. He never argued that the INA's jurisdiction-stripping provision precluded review.

In an opinion by Judge Posner, however, the court of appeals dismissed the petition for lack of jurisdiction, App., *infra*, 10a, first explaining that

> [o]ur recent decisions in *Zamora-Mallari* v. *Mukasey*, 514 F.3d 679, 694 (7th Cir. 2008), *Kucana* v. *Mukasey* 533 F.3d 534 (7th Cir. 2008), and *Huang* v. *Mukasey*, 534 F3d 618 (7th Cir. 2008) hold (contrary to the view of some of our sister circuits) that there is no power of judicial review of petitions to reopen removal proceedings unless the petition presents a question of law [o]r a constitutional issue.

App., *infra*, 2a (citations from other circuits omitted). This holding turned on interpretation of both the jurisdiction-stripping and jurisdiction-restoring provisions. The first two of the cited decisions had held that the jurisdiction-stripping provision generally precludes review of BIA reopening decisions because "even if the alien demonstrates that he is entitled to relief" the Attorney General had, by administrative regulation, declared such decisions to be discretionary. *Zamora-Mallari*, 514 F.3d 679, 694 (7th Cir. 2008); *Kucana* v. *Mukasey*, 533 F3d 534, 536 (7th Cir. 2008). All three decisions had then held that particular issues presented did not involve either constitutional claims or questions of law, as the jurisdiction-restoring provision requires. *Huang* v. *Mukasey*, 534 F.3d 618, 621-623 (7th Cir. 2008), petition for cert. filed *sub nom. Dung* v. *Mukasey*, 77 U.S.L.W. 3252 (U.S. Oct. 13, 2008) (No. 08-490); *Kucana*, 533 F.3d at 538; *Zamora-Mallari*, 514 F.3d at 694.

The court of appeals then explained its conclusion that Ms. Jezierski's ineffective assistance claim fell outside the jurisdiction-restoring provision. It first acknowledged that the Seventh Circuit's prior "cases had not given consistent answers to the question of our power to review the Board's refusing to reopen a removal proceeding on the basis of ineffective assistance" and noted a "similar tension among [the] circuits." App., *infra*, 3a. Then after observing that "infringement of a constitutional right [wa]s *not* alleged," *id.* at 8a, the court held that the no-prejudice determination Ms. Jezierski sought to challenge was not a "question[] of law," *ibid.*, that would confer jurisdiction under Section 1252(a)(2)(D), but instead "a factual determination," *id.* at 9a. The court repeated that characterization in the opinion's concluding sentences:

> In deciding whether to reopen, the Board asked itself whether the removal proceeding might have come out differently had the alien been represented by competent counsel, and concluded that it would not have. That conclusion was not the answer to a question of law, but a discretionary determination.

Id. at 10a.

REASONS FOR GRANTING THE PETITION

The reading of 8 U.S.C. § 1252 relied upon below restricts judicial review of removal orders far beyond what Congress's plain language provides. Both the Seventh Circuit's broad interpretation of the jurisdiction-stripping provision and its narrow interpretation of the jurisdiction-restoring provision implicate broad and well-developed conflicts among the courts of appeals. Operating in tandem, these holdings bar judicial review of a large category of formerly reviewable administrative decisions, leaving immigrants within the Seventh Circuit no forum in which to seek correction of clear agency errors that courts of appeals elsewhere review (and correct) as a matter of course. This Court should grant review here to restore the scope of judicial review—and the uniformity in immigration law—that Congress sought to establish.

I. The Seventh Circuit's Interpretation Of The INA's Jurisdiction-Stripping Clause Squarely Conflicts With Decisions Of Every Other Court Of Appeals

Section 1252(a)(2)(B)(ii) denies courts jurisdiction to review decisions of the Attorney General "the authority for which is specified under this subchapter to be in [his] discretion," subject to one exception not relevant here. The decision below, following controversial Circuit precedent, see *Kucana*, 533 F.3d. at 536-537, held that this provision barred judicial review of BIA denials of motions to reopen—even though *Congress* did not specify that such decisions

are in the Attorney General's discretion—because regulations promulgated by the Attorney General himself so provide. This aspect of the decision below solidifies the Seventh Circuit's place in the minority on two lopsided Circuit conflicts concerning the meaning of Section 1252(a)(2)(B)(ii)'s specification requirement, and, as explained below, the court's sweeping—and erroneous—interpretation is especially consequential given the court's commitment to a highly restrictive (and also erroneous) construction of the jurisdiction-restoring provision.

A. The Seventh Circuit's Refusal To Review Reopening Denials Conflicts With Decisions Of Ten Other Courts Of Appeals

In 1988, this Court held that administrative denials of motions to reopen were reviewable for abuse of discretion. See *INS* v. *Adubu*, 485 U.S. 94, 104-105 (1988). Notwithstanding Congress's enactment of the jurisdiction-stripping provision in 1996, see Pub. L. 104-208, 110 Stat. 3009, ten courts of appeals continue to review such decisions—and have done so very recently. See *Sunarno* v. *Mukasey*, No. 07-2623, 2008 WL 4348073, at *2 (1st Cir. Sept. 25, 2008); *Zequiraj* v. *Mukasey*, No. 07-5794-ag, 2008 WL 4643892, at *1 (2d Cir. Oct. 21, 2008); *Baig* v. *Attorney General*, No. 08-1073, 2008 WL 4573006, at *1 (3d Cir. Oct. 15, 2008); *Dioubate* v. *Mukasey*, No. 07-2197, 2008 WL 4584860, at *1 (4th Cir. Oct. 15, 2008); *Alvarado-Vallardes* v. *Mukasey*, No. 08-60048, 2008 WL 4649081, at *1 (5th Cir. Oct. 21, 2008); *Zhang* v. *Mukasey*, 543 F.3d 851, 854 (6th Cir. 2008);

Meda-Morales v. *Mukasey*, No. 07-2432, 2008 WL 4307884, at *1 (8th Cir. Sept. 23, 2008); *Soto* v. *Mukasey*, No. 08-72029, 2008 WL 4613593, at *1 (9th Cir. Oct. 17, 2008); *Lopez* v. *Mukasey*, No. 07-9549, 2008 WL 3094052, at *2 (10th Cir. Aug. 7, 2008); *Belle* v. *Attorney General*, No. 08-11146, 2008 WL 4649392, at *1 (11th Cir., Oct. 22, 2008).[1]

Of the ten circuits that currently review motions to reopen, four have explicitly stated their reasons for not applying Section 1252(a)(2)(b)(ii). See *Zhao* v. *Gonzales*, 404 F.3d 295, 303 (5th Cir. 2005); *Miah* v. *Mukasey*, 519 F.3d 784, 789 n.1 (8th Cir. 2008); *Medina-Morales* v. *Ashcroft*, 371 F.3d 520, 528 (9th Cir. 2004); *Infanzon* v. *Ashcroft*, 386 F.3d 1359, 1361-1362 (10th Cir. 2004).

First, these courts have placed great weight on the plain language of the jurisdiction-stripping provision, in particular its direction that only decisions "the authority for which is *specified under this subchapter*" to be in the Attorney General's discretion, are presumptively beyond judicial review. The relevant "subchapter," subchapter II of Chapter 12, 8 U.S.C. §§ 1151-1378 (2006), includes a statutory right to reopen and sets forth general rules governing such motions, see 8 U.S.C. § 1229a(c)(7), these courts have reasoned, but it does not specify that such decisions

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[1] Although many of these very recent cases are unpublished, they all rest on earlier precedential decisions. See, *e.g.*, *Belle*, 2008 WL 4649392, at *1 (relying on authority of *Ali* v. *Attorney General*, 443 F.3d 804, 808 (11th Cir. 2006)); *Alvardo-Vallardes*, 2008 WL 4649081, at *1 (relying on authority of *Panjwani* v. *Gonzales*, 401 F.3d 626, 632 (5th Cir. 2005)).

are in the Attorney General's (or Homeland Security Secretary's) discretion. See *Miah*, 519 F.3d at 789 n.1; *Zhao*, 404 F.3d at 303 (noting that the provisions on reopening "do not furnish us with a level of deference to afford the Attorney General"); *Medina-Morales*, 371 F.3d at 528 ("far from authorizing pure, unguided discretion on the part of the Attorney General, [the provision] specifies guidelines for aliens and makes no mention of discretion"); see also *Infanzon*, 386 F.3d at 1361 (noting that motions to reopen are not a "form of discretionary relief"); *Singh* v. *Gonzales*, 404 F.3d 1024, 1026-1027 (7th Cir. 2005) ("Conspicuously absent [from the provision] is any specific language entrusting the decision on a motion to reopen to 'the discretion of the Attorney General'"), overruled by *Kucana*, 533 F.3d at 538.

As these courts explain, statutory silence is especially telling here because "[t]here are myriad Congressionally-defined, discretionary *statutory* powers of the Attorney General articulated within sections 1151 though 1378." *Zafar* v. *Attorney General*, 461 F.3d 1357, 1361 (11th Cir. 2006); see, *e.g.* 8 U.S.C. § 1157(c)(1) ("[T]he Attorney General may, *in the Attorney General's discretion* and pursuant to such regulations as the Attorney General may prescribe, admit any refugee who is not firmly resettled in any foreign country.") (emphasis added).

And, for Section 1252(a)(2)(B)(ii) purposes, these courts conclude, the *regulatory* declaration in 8 C.F.R. § 1003.2(a) reserving discretion to the BIA is not a substitute for a congressional specification. See *Miah*, 519 F.3d at 789 n.1 (Because "[t]he discretion

to * * * deny motions to reopen * * * is conferred by the Attorney General's regulations, not by statute * * *, we have continued our long-standing practice of reviewing" denials, for "abuse of the BIA's discretion.") (citation omitted); *Medina-Morales*, 371 F.3d at 528 (noting that the statute "can perhaps be said to have left such authority to the Attorney General by default. But default authority does not constitute the *specification* required by § 1252(a)(2)(B)(ii)."); *Zhao*, 404 F.3d at 303 ("The statutory language is uncharacteristically pellucid on this score; it does not allude generally to 'discretionary authority' or to 'discretionary authority exercised *under this statute*,' but specifically to 'authority for which is *specified under this subchapter* to be in the discretion of the Attorney General."). Or, as the Third Circuit explained in holding that review of continuances was not barred, "[t]he key to § 125[2](a)(2)(B)(ii) lies in its requirement that the discretion giving rise to the jurisdictional bar must be 'specified' by statute." *Khan* v. *Attorney General*, 448 F.3d 226, 232 (3d Cir. 2006); see also *Zafar*, 461 F.3d at 1361 ("[O]nly the particular discretionary authorities of the Attorney General expressly 'specified' in sections 1151 through 1378 are barred from our review under § 1252(a)(2)B)(ii).").

These decisions have cited a number of additional considerations buttressing their plain language interpretation. Not only is there generally a "strong presumption in favor of judicial review of administrative action," *INS* v. St. *Cyr*, 533 U.S. 289, 298 (2001), these courts have reasoned, see *Medina-Morales*, 371

F.3d at 525 (citing canon), but to conclude that Section 1252(a)(2)(B)(ii) extinguishes judicial review of denials of reopening is especially odd, considering that the statute that introduced the jurisdiction-stripping provision also included (1) the provision creating for the very first time a statutory right to reopen, see *Dada* v. *Mukasey*, 128 S. Ct. 2307, 2315-16 (2008), *and* (2) a provision expressly addressing judicial review of such decisions, see 8 U.S.C. § 1252(b)(6) (requiring consolidation of review of reopening with review of the underlying removal order). See *Infanzon*, 386 F.3d at 1362 ("[T]his section would have been unnecessary if Congress had intended such motions to be among those discretionary decisions not subject to review.").

Rather than join with the ten other courts of appeals, the court below followed its recent decision in *Kucana* v. *Mukasey*, 533 F.3d 534 (7th Cir. 2008). Although all parties in *Kucana* agreed that reopening denials were reviewable for abuse of discretion (and Circuit precedent so held, see *Singh*, 404 F.3d at 1026-1027), Chief Judge Easterbrook's opinion, for himself and Judge Ripple (who concurred "dubitante," *id.* at 539), first "wondered" whether review was proper, *id.* at 536, and ultimately held that Section 1252(a)(2)(B)(ii)'s jurisdictional bar applied, *id.* at 538.

In reaching that result, the *Kucana* court reasoned that Section 1252(a)(2)(B)(ii) "applies to discretionary decisions under regulations that are based on and implement the Immigration and Nationality Act," 533 F.3d at 536, and that the

statutory reopening provision, Section 1229a(c)(7), left the BIA with the power to govern its own proceedings—including authority to follow regulations designating particular decisions as discretionary. Since the Attorney General's regulation had done exactly that, the *Kucana* majority concluded, BIA decisions denying reopening were discretionary "as specified under this subchapter." *Ibid.*

The *Kucana* opinion explicitly considered—and rejected—other courts' decisions refusing to adopt this broad interpretation of the jurisdiction-stripping provision. It explained that considerations that had previously supported a narrow interpretation—(a) the interest in avoiding a constitutionally doubtful preclusion of judicial review and (b) the need to give some independent effect to Section 1252(b)(6)—had had lost force with enactment of the REAL ID Act. That Act, it believed, both addressed the most salient constitutional shortcoming of the prior regime (*i.e.*, that judicial review of "constitutional claims and questions of law" arising from otherwise discretionary administrative decisions would assure that "the agency [cannot] violate statutes and the Constitution at will," 553 F.3d at 538) and assured that Section 1252(b)(6) could have *some* independent effect (*i.e.*, by establishing judicial review procedures for challenges to denials of reopening that fall within Section 1252(a)(2)(D)'s restoration). 533 F.3d at 538.[2]

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[2] In at least four post-*Kucana* decisions involving reopening (including the present one), the Seventh Circuit has adhered to this construction of the jurisdictional bar. See *Adebowale* v. *Mukasey*, No. 07-2201, 2008 WL 4682508, at *2; *Iglesias* v.

B. The Decision Below Implicates A Broader Conflict About Whether The Attorney General May Immunize From Judicial Review *Any* Of His Agency's Immigration Actions By Describing Them As "Discretionary" In His Own Administrative Regulations

Just as the circuits have split over whether the Attorney General may preclude review of motions to reopen by declaring such decisions "discretionary" in administrative regulations, they have divided too over whether he may preclude review of other immigration actions in the same way. Since the jurisdiction-stripping provision applies by its own terms, with one narrow exception, to "*any* * * * decision * * * of the Attorney General * * * the authority for which is specified under this subchapter to be in the discretion of the Attorney General," 8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis added), any power to preclude judicial review through regulation potentially extends across nearly all the agency's immigration activities. Because the jurisdiction-stripping provision also treats the Secretary of Homeland Security in the same way, *ibid.*, any power to preclude through regulation should extend to that agency as well.

Mukasey, 540 F.3d 528, 529 (7th Cir. 2008); *Huang* v. *Mukasey*, 534 F.3d 618, 620 (7th Cir. 2008), petition for cert. filed *sub nom. Dung* v. *Mukasey*, 77 U.S.L.W. 3252 (U.S. Oct. 13, 2008) (No. 08-490).

It is thus no surprise to find the courts of appeals divided over whether such regulatory preclusion extends to other immigration actions, including motions to continue and to reconsider. Congress has never specified, for example, that motions to continue are discretionary or even when they should be granted. The Attorney General has specified through regulation, however, that "[t]he Immigration Judge *may* grant a motion for continuance for good cause shown." 8 C.F.R. § 1003.29 (emphasis added). In addition to the Seventh Circuit, see *Ali* v. *Gonzales*, 502 F.3d 659 (7th Cir. 2007), the Eighth and Tenth Circuits have held that this regulation supplies the specification necessary to preclude review under § 1252(a)(2)(B)(ii). See *Yerkovich* v. *Ashcroft*, 381 F.3d 990, 993-95 (10th Cir.2004); *Onyinkwa* v. *Ashcroft*, 376 F.3d 797, 799 (8th Cir. 2004). At the same time, the First, Second, Third, Fourth, Fifth, and Eleventh Circuits have explicitly rejected this conclusion.[3] See *Alsamhouri* v. *Gonzales*, 484 F.3d 117, 122 (1st Cir. 2007); *Sanusi* v. *Gonzales*, 445 F.3d 193, 198-199 (2d Cir. 2006); *Khan*, 448 F.3d at 232-233 (3d Cir. 2006); *Lendo* v. *Gonzales*, 493 F.3d 439, 441 n.1 (4th Cir. 2007); *Ahmed* v. *Gonzales*, 447 F.3d 433, 436-437 (5th Cir. 2006); *Zafar*, 461 F.3d at 1360-1362 (11th Cir. 2006); see also *Martinez* v. *Gonzales*, 166 F. Appx. 300, 300 (9th Cir. 2006) (holding the same in an unpublished opinion). Each holds that

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[3] Likewise, the Sixth Circuit reviews motions to continue for abuse of discretion, but it has adopted a different jurisdictional rationale. It holds that the statute authorizing motions to continue confers discretion on immigration judges—not on the Attorney General himself—and thus does not fall within the terms of the jurisdiction-stripping provision. See *Abu-Khaliel* v. *Gonzales*, 436 F.3d 627, 633-634 (6th Cir. 2006).

discretion supplied by rule is not "specified under [the statutory] subchapter," 8 U.S.C. § 1252(a)(2)(B)(ii), and thus cannot trigger preclusion.

Confusingly, the two other circuits—the Eighth and Tenth—that hold that discretion supplied by administrative rule precludes review of motions to continue do *not* follow that approach for motions to reopen. Compare *Onyinkwa*, 376 F.3d at 799 ("Whenever a regulation implementing a subchapter II statute confers discretion upon an IJ, IIRIRA generally divests courts of jurisdiction to review the exercise of that discretion.") (8th Cir.) and *Yerkovich*, 381 F.3d at 993-995 ("Although the statutes themselves do not specifically confer discretion on the Attorney General to grant or deny a continuance, the regulations clearly confer such discretion on the IJ.") (10th Cir.) with *Miah* v. *Mukasey*, 519 F.3d 784, 789 n. 1 (8th Cir. 2008) (refusing to apply Section 1252(a)(2)(B)(ii) to motions to reopen or reconsider because "[t]he discretion to grant or deny [such] motions * * * is conferred by the Attorney General's regulations, not by statute") and *Thongphilack* v. *Gonzales*, 506 F.3d 1207, 1209-1210 (10th Cir. 2007) (reviewing motion to reopen for abuse of discretion despite the discretionary language in the regulations governing reopening). The fact that decisions in two circuits interpret the jurisdiction-stripping provision one way for motions to continue and another way for motions to reopen is itself powerful evidence of the need for this Court to give the provision a clear and authoritative interpretation.

A similar conflict has recently developed in cases involving BIA denials of *reconsideration*. As with reopening, a regulation, rather than the statute itself, provides that motions to reconsider are within the agency's discretion. (Indeed, it is the same regulation as the one governing reopening, 8 C.F.R. § 1003.2(a).) Accordingly, ten circuits continue to review motions to reconsider, notwithstanding the jurisdiction-stripping provision. See *Arias-Valencia* v. *Mukasey*, 529 F.3d 428, 430 n.1 (1st Cir. 2008); *Shao* v. *Mukasey*, No. 07-2689-ag, 2008 WL 4531571, at *29 (2d Cir. Oct. 10, 2008); *Borges* v. *Gonzales*, 402 F.3d 398, 404 (3d Cir. 2005); *Jean* v. *Gonzales*, 435 F.3d 475, 481 (4th Cir. 2006); *Singh* v. *Gonzales*, 436 F.3d 484, 486 (5th Cir. 2006); *Sanusi* v. *Gonzales*, 474 F.3d 341, 345 (6th Cir. 2007); *Isse* v. *Mukasey*, 524 F.3d 886, 887 (8th Cir. 2008); *Morales Apolinar* v. *Mukasey*, 514 F.3d 893, 895 (9th Cir. 2008); *Belay-Gebru* v. *INS*. 327 F.3d 998, 1000 n.5 (10th Cir. 2003); *Calle* v. *Attorney General*, 504 F.3d 1324, 1328 (11th Cir. 2007). By contrast, the Seventh Circuit recently ruled that that the jurisdiction-stripping provision bars review of denials of reconsideration, on the ground that it "appl[ies] to discretionary decisions authorized by regulations that are based on and implement the Immigration and Nationality Act," *Johnson* v. *Mukasey*, No. 08-1126, 2008 WL 4414599, at *1 (7th Cir. Oct. 1, 2008).

The split over whether discretion supplied by rule can trigger the INA's jurisdiction-stripping provision now extends from motions to reopen, to continue, and to reconsider and potentially to *any* immigration action the Attorney General (or Secretary of Home-

land Security) declares discretionary. It is no wonder that five Seventh Circuit judges were concerned that *Kucana*'s holding would erode judicial review of immigration decisions generally. See 533 F.3d at 541 (Cudahy, J., dissenting) ("I am reluctant to broaden the immunity from review of an administrative process not necessarily renowned for its reliability."); *id.* at 542 (Ripple, J., dissenting from denial of rehearing en banc) (joined by Rovner, Wood, and Williams, JJ.) (expressing concern about the jurisdiction-stripping provision's "expansion into the realm of outcome determinative decisions"). This expanding confusion in an area of critical importance to many people's lives calls for this Court's immediate intervention.

II. The Seventh Circuit's Interpretation Of The INA's Jurisdiction-*Restoring* Provision Also Conflicts With That Of Other Courts Of Appeals

Having decided that Ms. Jezierski's petition was (by operation of 8 C.F.R. § 1003.2(a)), subject to jurisdiction-stripping under Section 1252(a)(2)(B)(ii), the court below held that the authority conferred by Congress in 2005 did not supply jurisdiction, because the BIA's "no prejudice" conclusion was a "discretionary determination," App., *infra*, 10a, rather than "question[] of law," *ibid.*, for purposes of Section 1252(a)(2)(D).

In so ruling, the Seventh Circuit reaffirmed its place among the minority of courts of appeals that have given Section 1252(a)(2)(D) a narrow con-

struction—as authorizing courts to decide only "pure" questions of law, but not "mixed" ones, such as the prejudice question here, see *Strickland* v. *Washington*, 466 U.S. 668, 698 (1984) (describing prejudice component of Sixth Amendment ineffective assistance claim as a "mixed question of law and fact"); *Fadiga* v. *Attorney General*, 488 F.3d 142, 153 & n.17 (3d Cir. 2007) (applying *de novo* standard in reviewing BIA prejudice determination). Five circuits, however, have rejected that restrictive interpretation.

The Seventh Circuit first staked out this position in *Cevilla* v. *Gonzales*, 446 F.3d 658 (7th Cir. 2006), where the court, referencing the reasoning of the later-withdrawn opinion in *Chen* v. *Department of Justice*, 434 F.3d 144, 153 (2d Cir.) (*Chen I*), on panel reh'g, 471 F.3d 315 (2d Cir. 2006) (*Chen II*), as well as the Ninth Circuit's opinion (also later vacated) in *Ramadan* v. *Gonzales*, 427 F.3d 1218 (9th Cir.2005) (*Ramadan I*), on reh'g, *Ramadan* v. *Gonzales*, 479 F.3d 646 (9th Cir. 2007) (per curiam), dismissed a review petition, explaining that only "statutory-construction questions" qualify as "questions of law," within the meaning of Section 1252(a)(2)(D). See 446 F.3d at 661; accord *Viracacha* v. *Mukasey*, 518 F.3d 511, 515 (7th Cir. 2008) ("[T]he proviso in § 1252(a)(2)(D) is limited to 'pure' questions of law."); *Leguizamo-Medina* v. *Gonzales*, 493 F.3d 772, 774 (7th Cir. 2007) ("[O]nly 'pure' legal questions (as opposed to characterizations or 'mixed' questions) are covered by subsection (D)."); *Johnson*, 2008 WL 4414599, at *2 (same).

Two other circuits have adopted this restrictive interpretation. In *Almuhtaseb* v. *Gonzales*, 453 F.3d 743 (6th Cir. 2006), the Sixth Circuit (also relying on the reasoning of the withdrawn *Chen I* and *Ramadan I* opinions) held that, for judicial review purposes, "a 'question of law' is a question regarding the construction of a statute," *id.* at 748 (internal quotation marks omitted), and in *Diallo* v. *Gonzales*, 447 F.3d 1274 (10th Cir. 2006), the Tenth Circuit (also citing *Chen I* and *Ramadan I*) described the subsection as granting jurisdiction over "a narrow category of issues regarding statutory construction," *id.* at 1282 (internal quotation marks omitted).[4]

In reaching that conclusion, these courts—and the influential *Chen I* and *Ramadan I* opinions—have relied primarily on the legislative history of the REAL ID Act, in which they found indications that Congress did not intend the phrase "questions of law" to have its ordinary meaning and that it was understood by some legislators to incorporate an implicit "pure" questions limitation. See, *e.g.*, *Chen I*, 434 F.3d at 153 (citing committee report indicating that "pure" was deleted from earlier version, because it would have been "'superfluous'") (quoting H.R. Rep. No. 72, 109th Cong., 1st Sess. 175 (2005)).

Five courts of appeals (including the Second Circuit and Ninth Circuits, in their revised opinions

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[4] Decisions of the Fourth and Fifth Circuits suggest a comparably narrow, if not identical, approach. See *Saintha* v. *Mukasey*, 516 F.3d 243, 250 (4th Cir. 2008), petition for cert. filed, 77 U.S.L.W. 3058 (U.S. July 11, 2008) (No. 08-71); *Zhu* v. *Gonzales*, 493 F.3d 588, 596 n.31 (5th Cir. 2007).

in *Chen* and *Ramadan*) have rejected this restrictive interpretation. The Third, Eighth, and Eleventh Circuits have all held that Section 1252(a)(2)(D) jurisdiction includes "mixed" questions of law and fact. See *Nguyen* v. *Mukasey*, 522 F.3d 853, 854-855 (8th Cir. 2008) (per curiam) (provision authorizes courts to decide "whether the IJ properly applied the law to the facts in determining the alien's eligibility for discretionary relief"); *Jean-Pierre* v. *Attorney General*, 500 F.3d 1315, 1322 (11th Cir. 2007) (courts of appeals have "jurisdiction to review * * * challenges [to] the application of an undisputed fact pattern to a legal standard"); *Toussaint* v. *Attorney General*, 455 F.3d 409, 412 n.3 (3d Cir. 2006) ("[W]e have jurisdiction [under section 1252(a)(2)(D)] to review the BIA's application of law to the facts of this case."). And the Ninth Circuit in *Ramadan II* concluded that "jurisdiction over 'questions of law' * * * includes not only 'pure' issues of statutory interpretation, but also application of law to undisputed facts, sometimes referred to as mixed questions of law and fact," 479 F.3d at 648.

These courts have reasoned that, isolated statements in committee reports notwithstanding, the language of the enacted statute does not support a "pure questions" restriction, see *Ramadan*, 479 F.3d at 654; that the legislative history is ambiguous and may be read to support an intention to retain jurisdiction to review mixed questions of law and fact, see *id.* at 653-654; *Jean-Pierre*, 500 F.3d at 1322; *Chen II*, 475 F.3d at 325-327; and that the restrictive interpretation is inconsistent with this Court's decision in *INS* v. *St. Cyr.*, 553 U.S. 406 (2001), which

is widely acknowledged to have spurred Congress to enact the section.

Significantly, the decisions that largely launched the movement toward a restrictive interpretation, the initial panel opinions in *Chen* and *Ramadan*, were withdrawn by the Second and Ninth Circuits, and those courts' opinions on rehearing significantly modified the earlier opinions' gloss on Section 1252(a)(2)(D). See *Chen*, 471 F.3d at 326; *Ramadan*, 479 F.3d at 652. The substituted *Chen* opinion relied on Congress's plain intent to restore the full sweep of jurisdiction "courts traditionally exercised in habeas review of Executive detentions," 471 F.3d at 326-327, and on the fact that "mixed" questions were among the "'issues relating to the legality of the detention,'" *id.* at 327 (quoting *St. Cyr*, 533 U.S. at 301 n.14) (emphasis omitted), that habeas courts historically have addressed.[5]

As the decision below and other recent cases make clear, however, the interpretation put forward in the first *Chen* opinion continues to govern in the Seventh, Sixth, and Tenth Circuits. See *Johnson*, 2008 WL 4414599, at *2 ("[O]nly pure questions of law are reviewable, and not the application of a legal standard to fact, when a discretionary determination

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[5] As the same time, the Second Circuit declined to give "questions of law" its broadest meaning, pronouncing the term ambiguous and citing legislative history as a basis for a somewhat narrow approach. 471 F.3d at 325. Although the revised opinion adhered to its earlier holding, it recognized "the possibility of a case in which the 'application' of a statute actually presents a 'question of law' within the meaning of the REAL ID Act." *Id.* at 331 n.11.

by the Board is challenged in court"); *Adebowale* v. *Mukasey*, No. 07-2201, 2008 WL 4682508, at *2 (7th Cir. Oct. 24, 2008); *Viracacha*, 518 F.3d at 515; *Almuhtaseb* v. *Gonzales*, 453 F.3d at 748 (6th Cir.); *Diallo* v. *Gonzales*, 447 F.3d at 1281 (10th Cir.).

III. The Importance Of The Legal Questions Splitting The Courts Of Appeals And The Magnitude Of The Conflict Warrant This Court's Review

The legal rules applied and the results reached in the decision below place the Seventh Circuit in stark conflict with every other court of appeals. As noted above, no other court has held that Section 1252(a)(2)(B)(ii) operates (in conjunction with 8 C.F.R. § 1003.2(a)) to deprive the courts of appeals of jurisdiction to review denials of reopening. See Part I, *supra*. And no other court has treated BIA ineffective assistance conclusions as unreviewable factual determinations. See *Omar* v. *Mukasey*, 517 F.3d 647, 650 (2d Cir. 2008) (per curiam); *Fadiga* v. *Attorney General*, 488 F.3d 142, 153 (3d Cir. 2007); *Mai* v. *Gonzales*, 473 F.3d 162, 164 (5th Cir. 2006); *Sako* v. *Gonzales*, 434 F.3d 857, 863 (6th Cir. 2006); *Akinwunmi* v. *INS*, 194 F.3d 1340, 1341 n. 2 (10th Cir. 1999).

These specific conflicts are significant enough to warrant review, given recent recognition by Congress and this Court of reopening as an "important safeguard," which helps "ensure a proper and lawful disposition." *Dada* v. *Mukasey*, 128 S. Ct. 2307, 2322-2324 (2008); see also *INS* v. *Doherty*, 502 U.S.

314, 330-331 (1992) (Scalia, J., concurring in part and dissenting in part) (noting that "reopening is the sole means of raising certain [important] issues"). And though ineffective assistance of counsel is only one of several grounds on which reopening has been granted, see pp. 36-37, *supra*, the hardships suffered by aliens who find themselves at the mercy of predatory and unscrupulous members of the immigration bar are both serious and well-documented. See, *e.g.*, Michael S. Vastine, *Is Your Client Prejudiced? Litigating Ineffective-Assistance-of-Counsel Claims in Immigration Matters Arising In The Eleventh Circuit*, 62 U. Miami L. Rev. 1063, 1076 (2008) (noting "ample * * * empirical evidence that a great deal of inadequate, if not illegal, representation is carried out * * * throughout the country.").

The legal rules on which the decision below rests, however, extend far beyond the context of this particular case. Reopening is available in many situations, not just when the removal decision was reached in proceedings where an alien was represented by a malpracticing attorney. And the Seventh Circuit's decision denying review potentially extends to any immigration decision not resting on "pure law" that the Attorney General or Secretary of Homeland Security has specified as "discretionary" through administrative regulation. See Parts I-II, *supra*.

Moreover, although some other courts of appeals have taken either a broad view of the jurisdiction-stripping language of Section 1252(a)(2)(B)(ii) or a narrow view of the jurisdiction-restoring provision's

reference to "questions of law," the Seventh Circuit's embrace of these rules *in tandem* separates the judicial review regime in that circuit from that prevailing elsewhere. Decisions that would be reviewable in any other circuit—including many claims that have led to reversal of BIA decisions on the merits—will not receive a "day in court" if issued within the Seventh Circuit. Compare *Atilano-Garcia* v. *Gonzales*, 159 Fed. Appx. 773 (9th Cir. 2005) (reversing denial of a motion to reopen as an abuse of discretion), *Mirza* v. *Gonzales*, 148 Fed. Appx. 467 (6th Cir. 2005) (same), *Bhasin* v. *Gonzales*, 423 F.3d 977 (9th Cir. 2005) (same), and *Zhao* v. *Gonzales*, 404 F.3d 295 (5th Cir. 2005) (same) with *Adebowale*, 2008 WL, at *2 (refusing review of denial of reopening), *Sharashidze* v. *Mukasey*, No. 07-2611, 2008 WL 4120022 (7th Cir. Sept. 8, 2008) (same), *Mitreva* v. *Mukasey*, No. 07-3058, 2008 WL 4093567 (7th Cir. Sept. 2, 2008) (same), *Yang* v. *Mukasey*, 2008 WL 3852744 (7th Cir. Aug. 19, 2008) (same), and *Huang* v. *Mukasey*, 534 F.3d 618 (7th Cir. 2008) (same), petition for cert. filed *sub nom. Dung* v. *Mukasey*, 77 U.S.L.W. 3252 (U.S. Oct. 13, 2008) (No. 08-490).

This sharp divergence in judicial-review regimes is especially unacceptable because it involves a statute enacted with the specific aim of reducing "piecemeal review, uncertainty, [and] lack of uniformity," H.R. Rep. No. 72, 109th Cong., 1st Sess. 174 (2005), in a field—immigration law—in which the Constitution includes an express commitment to "uniform[ity]," U.S. Const. Art. I, § 8, cl. 4, and where this Court and other federal courts have long strived for nationwide consistency, see *Zadvydas* v. *Davis*,

533 U.S. 678, 711 (2001) (Kennedy, J., dissenting) (stressing the necessity "that the Nation speak with one voice" on immigration matters); *Henderson* v. *Mayor of New York*, 92 U.S. 259, 273 (1875) ("The laws which govern [immigration] ought to be the same in New York, Boston, New Orleans, and San Francisco."); *Ferreira* v. *Ashcroft*, 382 F.3d 1045, 1050 (9th Cir. 2004) (noting that "the need for national uniformity is paramount" in immigration law); *Aguirre* v. *INS*, 79 F.3d 315, 317 (3d Cir. 1996) (concluding that "the interests of nationwide uniformity outweigh our adherence to Circuit precedent in this instance"); *Jaramillo* v. *INS*, 1 F.3d 1149, 1155 (11th Cir. 1993) (changing course, citing the need to "heal an intercircuit split * * * [and] achieve nationwide uniformity").[6]

The practical importance of the Seventh Circuit's restrictive regime is large. In cases like this, judicial review is all that shields individuals, like petitioner, who have entered this country lawfully and abided by its laws, from improper removal to locations far from important family and other responsibilities. As the abuse-of-discretion reversals cited above attest, the "administrative process [at issue is] not necessarily renowned for its reliability," *Kucana*, 533 F.3d at 541

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[6] Rather than apply a thumb on the scale in favor of uniformity, the Seventh Circuit has in recent cases committed itself to an increasingly solitary course, creating circuit conflicts on questions on which there previously had been uniform agreement. See *Kucana*, 533 F.3d at 540 (Cudahy, J., dissenting) (noting the circuit's new "isolated posture" on reviewability of reopening denials); *Johnson*, 2008 WL, at * 1 (opening up a circuit split on the reviewability of motions to reconsider).

(Cudahy, J., dissenting). On the contrary, the serious deficiencies of both the IJ process and the BIA appeals process have been extensively documented. *Banks* v. *Gonzales*, 453 F.3d 449, 452 (7th Cir. 2006) ("Immigration Judge Vinikoor[, the IJ in the present case,] did what this regulation says that an IJ 'shall not' do."); *id.* at 454-455 ("The immigration bureaucracy has much to learn from the experience of other federal agencies * * *."); *Benslimane* v. *Gonzales*, 430 F.3d 828, 829-830 (7th Cir. 2005) (Posner, J.) (noting "staggering 40 percent reversal rate [in petitions] * * * resolved [by Seventh Circuit] on the merits. * * * Our criticisms of the Board and of the immigration judges have frequently been severe. Other circuits have been as critical. This tension between judicial and administrative adjudicators * * * is due to the fact that the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice.") (citations omitted); *Guchshenkov* v. *Ashcroft*, 366 F.3d 554, 560 (7th Cir. 2004) (noting "systemic failure by the judicial officers of the immigration service to provide reasoned analysis"); see also Evelyn H. Cruz, *Double The Injustice, Twice The Harm: The Impact Of The Board Of Immigration Appeals's Summary Affirmance Procedures*, 16 Stan. L. & Pol'y Rev. 481 (2005).

This Court's intervention is especially warranted because the Seventh Circuit's interpretation of both the jurisdiction-stripping and jurisdiction-restoring provisions rest on significant legal errors. As other courts—and dissenting judges of the Seventh Circuit—have emphasized, the broad construction of

Section 1252(a)(2)(B)(ii) essentially reads the term "specified" out of the statute, with the troubling and almost certainly unintended consequence that the power to preclude judicial review is left to the very agency whose actions would be subject to challenge. This construction gives the provision a different, broader meaning in light of the REAL ID Act, even though that statute left the language of Section 1252(a)(2)(B)(ii) untouched and *extended* judicial review in cases where Congress had previously sought to deny it, see 8 U.S.C. § 1252(a)(2)(D).

The Seventh Circuit's construction of Section 1252(a)(2)(D) rests on equally serious interpretive errors. The statutory language does not hint at a "pure questions" limitation and traditional habeas jurisdiction, which the provision was intended to capture, extended to "questions of law that arose in the context of discretionary relief." *St. Cyr*, 533 U.S. at 307.

IV. This Case Presents An Especially Suitable Vehicle For Settling These Entrenched And Pressing Conflicts

This case presents a particularly appropriate opportunity for this Court to settle these well-developed conflicts. The Seventh Circuit's decision interpreted both provisions, which Congress intended to operate as an integrated, coherent whole. In contrast, decisions that *sustain* jurisdiction on one theory or the other—that is, hold either that jurisdiction-stripping is inoperative or that review has been restored—are unlikely to offer the Court an

opportunity to consider the review regime as a whole. They need not—and typically do not—address the other question. And in the large majority of circuits where less restrictive interpretations of these two provisions have become settled law, jurisdictional matters are seldom extensively explored by the court or the parties.

There is no reason, moreover, to expect that these conflicts will dissipate with time. Over the votes of five Seventh Circuit judges, the Seventh Circuit refused en banc rehearing in *Kucana*, see 533 F.3d at 538; *id.* at 542 (Ripple, J., dissenting) (predicting that the court's rule "will no doubt warrant close scrutiny by the Supreme Court" and citing Sup. Ct. R. 10), just as it has just declined to reconsider *Cevilla*, in light of the Second Circuit's and Ninth Circuit's rehearing decisions in *Chen* and *Ramadan*, see *Viracacha*, 518 F.3d at 515 (reaffirming that Section 1252(a)(2)(D) restores jurisdiction for courts to review only pure questions of law). The extent and practical importance of the divide make further "percolation" especially inappropriate.

V. The Court Below Also Erred In Concluding That Petitioner Did Not Present A Constitutional Claim

Although the alternative ruling below, that review was unavailable under Section 1252(a)(2)(D)'s restoration of jurisdiction for "constitutional claims," does not carry the same broad legal and practical significance as the court's "question[] of law" holding (and might not independently warrant exercise of

this Court's certiorari jurisdiction), that conclusion was also in error.

To the extent the opinion's opaque statement that "infringement of a constitutional right [wa]s *not* alleged," here, App., *infra*, 8a, was meant to describe some sort of forfeiture on Ms. Jezierski's part, the submissions to the appeals court do not support that characterization. Although her brief did not separately address "constitutional claim" jurisdiction—the Government did not contend that jurisdiction had been "stripped" in the first place—petitioner repeatedly invoked her rights to a "fundamentally fair" hearing, an opportunity to be heard, and adequate representation, see, *e.g.*, C.A. Br. at 7-8; C.A. Reply Br. at 4. She argued that her claim was controlled by precedent, including a Seventh Circuit case, that found or suggested a constitutional basis for claims of ineffective assistance in removal proceedings. See C.A. Br. 7-8 (citing *Sanchez* v. *Keisler*, 505 F.3d 641, 647 (7th Cir. 2007)).

To the extent the opinion's observation was meant (as the surrounding discussion suggests) as a statement about the contours of the constitutional protection someone in Ms. Jezierski's position *could* claim, moreover, such a conclusion would entail an *exercise* of jurisdiction and therefore would be inconsistent with the court's jurisdictional dismissal. Even courts that have held there is no due process protection against ineffective assistance in removal proceedings, see p. 36, *infra*, have recognized that they were deciding "constitutional claims."

Indeed, while review here is required to resolve the significant conflicts over the meaning of the INA's *jurisdiction-stripping and -restoring provisions*–and reversal does not depend on the Court's taking up *any* constitutional question, let alone announcing any particular constitutional rule—the Seventh Circuit's understanding of due process adds to widespread disagreement among the courts of appeals as to when and whether harmful legal representation in removal proceedings violates the Constitution.

Most courts have recognized a due process right to effective assistance of counsel. See, *e.g.*, *Hernandez* v. *Reno*, 238 F.3d 50, 55 (1st Cir. 2001); *Omar* v. *Mukasey*, 517 F.3d 647, 650 (2d. Cir. 2008); *Fadiga*, 488 F.3d at 153 (3d Cir.); *Sako* v. *Gonzales*, 434 F.3d 857, 863 (6th Cir. 2006); *Maravilla Maravilla* v. *Ashcroft*, 381 F.3d 855, 857-858 (9th Cir. 2004); *Osei* v. *INS*, 305 F.3d 1205, 1208 (10th Cir. 2002); *Dakane* v. *Attorney General*, 399 F.3d 1269, 1273 (11th Cir. 2004). Others have rejected that conclusion. See *Rafiyev* v. *Mukasey*, 536 F.3d 853, 861 (8th Cir. 2008) ("[T]here is no constitutional right to an attorney, so an alien cannot claim constitutionally ineffective assistance of counsel."); *Afanwi* v. *Mukasey*, 526 F.3d 788, 798 (4th Cir. 2008) (holding "contrary to some of our sister circuits, that retained counsel's ineffectiveness in a removal proceeding cannot deprive an alien of his Fifth Amendment right," because retained attorney was not "engaging in state action"). And still others have spoken ambivalently on the subject. Compare *Goonsuwan* v. *Ashcroft*, 252 F.3d 383, 385 n.2 (5th Cir. 2001) ("[A]liens do * * *

have a constitutionally protected right to procedural due process when deportation proceedings are initiated against them. This right to due process is violated when the representation afforded them was so deficient as to impinge upon the fundamental fairness of the hearing.") (internal quotation marks and citations omitted) with *Mai*, 473 F.3d 162, 165 5th Cir. 2006) (describing "the source and extent of this due process right" as "unclear"). The opinion below appears to stake out a middle position, namely, that an immigrant presents a "constitutional claim" only if ineffective assistance occurs in a removal proceeding characterized by unusually "complex[] * * * issues" or unspecified "other conditions," App., *infra*, 7a.

Although the constitutional questions need not be taken up in this case—the statutory provisions on which the courts of appeals are divided apply in cases where no constitutional issue is asserted—and there may be reasons why the Court might be disinclined to address them here,[7] the issue *could be* decided were the Court to grant review, and if taken up, would supply an alternative ground for reversing the decision below.

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[7] In addition to the Court's general reluctance to decide constitutional questions in advance of the necessity of doing so, see *Ashwander* v. *TVA*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring), the Attorney General has recently announced that he will review the issue of ineffective assistance in immigration proceedings and his review might yield information relevant to formulating the proper constitutional rule, see Orders No. 2990-2008, 2991-2008, 2992-2008, Office of the Attorney General (Aug. 7, 2008).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 07-3569

TERESA JEZIERSKI,

Petitioner,

v.

MICHAEL B. MUKASEY, Attorney General
of the United States,

Respondent.

Petition to Review Order
of the Board of Immigration Appeals.
No. A21 530 826

ARGUED AUGUST 5, 2008—DECIDED SEPTEMBER 10, 2008

Before POSNER, COFFEY, and MANION, *Circuit Judges.*

POSNER, *Circuit Judge.* The petitioner asked the Board of Immigration Appeals to reopen her removal proceeding on the ground that she had received ineffective assistance of counsel. The Board refused, finding that she had not shown that the failures of her counsel of which she complained would have led to a different result; in other words, she had failed to prove "prejudice." We must decide whether we have jurisdiction to review the denial of her motion.

Our recent decisions in *Zamora-Mallari v. Mukasey,* 514 F.3d 679, 694 (7th Cir. 2008); *Kucana v. Mukasey,* 533 F.3d 534 (7th Cir. 2008), and *Huang v. Mukasey,* 534 F.3d 618 (7th Cir. 2008), hold (contrary to the view of some of our sister circuits, see, e.g., *Shardar v. Attorney General,* 503 F.3d 308 (3d Cir. 2007); *Fernandez v. Gonzales,* 439 F.3d 592 (9th Cir. 2006)) that there is no power of judicial review of petitions to reopen removal proceedings unless the petition presents a question of law (or a constitutional issue—there is a distinction so far as review jurisdiction is concerned, but that's for later to explain)."The facts that the Board finds, and the reasons that it gives, en route to exercising its discretion to grant or deny a petition to reopen a removal proceeding, and the discretionary decision itself, cannot be reexamined by a court, whether for clear error, lack of substantial evidence, abuse of discretion, or any other formulation of a ground for reversing an administrative decision; all the court can decide is whether the Board committed an error of

law. [See also *Liu v. INS,* 508 F.3d 716, 720-21 (2d Cir. 2007) (per curiam).] That will usually be a misinterpretation of a statute, regulation, or constitutional provision. But it could also be a misreading of the Board's own precedent, or the Board's use of the wrong legal standard [*Ali v. Achim,* 468 F.3d 462, 465 (7th Cir. 2006)], or simply a failure to exercise discretion [as in *Sanchez v. Keisler,* 505 F.3d 641, 649-50 (7th Cir. 2007)], or to consider factors acknowledged to be material to such an exercise." *Huang v. Mukasey, supra,* 534 F.3d at 620 (citations omitted).

We noted in *Huang* that our cases had not given consistent answers to the question of our power to review the Board's refusing to reopen a removal proceeding on the basis of ineffective assistance of the alien's counsel in that proceeding. *Id.* at 623. *Sanchez v. Keisler, supra,* 505 F.3d at 647-48, and *Kay v. Ashcroft,* 387 F.3d 664, 676 (7th Cir. 2004), had seemed to suggest a broad power, but *Patel v. Gonzales,* 496 F.3d 829, 831 (7th Cir. 2007); *Magala v. Gonzales,* 434 F.3d 523, 525 (7th Cir. 2005), and *Stroe v. INS,* 256 F.3d 498 (7th Cir. 2001), a narrow one. There is a similar tension among circuits. Compare *Omar v. Mukasey,* 517 F.3d 647 (2d Cir. 2008) (per curiam); *Fadiga v. Attorney General,* 488 F.3d 142, 153-54 (3d Cir. 2007); *Sako v. Gonzales,* 434 F.3d 857, 863 (6th Cir. 2006), and *Dakane v. Attorney General,* 399 F.3d 1269, 1273-74 (11th Cir. 2005), all suggesting a broad power, with *Jamieson v. Gonzales,* 424 F.3d 765, 768 (8th Cir. 2005), and *Nativi-Gomez v. Ashcroft,* 344 F.3d 805, 807-09 (8th Cir. 2003), suggesting a narrow one.

Within this circuit, at least, there is no actual conflict. In *Kay,* the panel determined that the denial of effective assistance of counsel in the circumstances violated the Fifth Amendment; it wasn't a "question of law" ruling, but a constitutional ruling, which is different. The panel in *Sanchez* did not discuss the issue of jurisdiction (neither did *Kay,* for that matter), doubtless because the Justice Department took the position that we could review denials of petitions to reopen for abuse of discretion. "When a court resolves a case on the merits without discussing its jurisdiction to act, it does not establish a precedent requiring similar treatment of other cases once the jurisdictional problem has come to light. *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 119 and n. 29 (1984); *United States v. L.A. Tucker Truck Lines, Inc.,* 344 U.S. 33, 37-38 (1952)." *Glidden v. Chromalloy American Corp.,* 808 F.2d 621, 625 (7th Cir. 1986). Especially after *Kucana* and *Huang,* it is apparent that our power to review such denials is narrow even when the alien is complaining of ineffective assistance of counsel.

No statute entitles the alien to effective assistance of counsel, *Stroe v. INS, supra,* 256 F.3d at 499-500 (7th Cir. 2001); *Afanwi v. Mukasey,* 526 F.3d 788, 796 (4th Cir. 2008), although he is allowed to have counsel at his own expense. 8 U.S.C. § 1362. The Sixth Amendment is inapplicable to removal proceedings. *Gjeci v. Gonzales,* 451 F.3d 416, 421 (7th Cir. 2006); *Stroe v. INS, supra,* 256 F.3d at 500; *Ram v. Mukasey,* 529 F.3d 1238, 1241 (9th Cir. 2008); *Afanwi v. Mukasey, supra,* 526 F.3d at 796-97; *Zeru*

v. Gonzales, 503 F.3d 59, 72 (1st Cir. 2007); *cf. Coleman v. Thompson,* 501 U.S. 722, 752-54 (1991); *Wainwright v. Torna,* 455 U.S. 586, 587-99 (1982). And no statute or constitutional provision entitles an alien who has been denied effective assistance of counsel in his (in this case her) removal proceeding to reopen the proceeding on the basis of that denial. *Stroe v. INS, supra,* 256 F.3d at 501; *Rafiyev v. Mukasey,* Nos. 07-1317, 07-2406, 2008 U.S. App. LEXIS 16 637, at *19-20 (8th Cir. Aug. 5, 2008). Nevertheless, if the Board of Immigration Appeals adopted a rule entitling such an alien to reopen, its failure to follow the rule in a particular case would present a question of law. *Aris v. Mukasey,* 517 F.3d 595, 600 (2d Cir. 2008); cf. *Hanan v. Mukasey,* 519 F.3d 760, 764 (8th Cir. 2008); *Khan v. Mukasey,* 517 F.3d 513, 518-19 (7th Cir. 2008). An administrative agency can change its rules, but it has to justify the change, and a challenge to the adequacy of the agency's justification for doing so presents a question of law. (For the general principle, see *National Cable & Telecommunications Ass'n v. Brand X Internet Services,* 545 U.S. 967, 981, 1001 (2005), and *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.,* 463 U.S. 29, 46-57 (1983), and for its application to petitions to reopen see *Stroe v. INS, supra,* 256 F.3d at 502-03; *Pica v. Mukasey,* 512 F.3d 75 (2d Cir. 2008); *Mai v. Gonzales,* 473 F.3d 162, 165 (5th Cir. 2006); *Cruz v. Attorney General,* 452 F.3d 240, 250 (3d Cir. 2006).)

We cannot find any rule declared by the Board that entitles the alien to reopen his removal proceeding on the basis of ineffective assistance of

counsel. The Board has adopted a rule—the *Lozada* rule (*In re Lozada*, 19 I. & N. Dec. 637 (BIA 1988), petition for review denied under the name *Lozada v. INS*, 857 F.2d 10, 13 (1st Cir.1988); see also *Cruz v. Attorney General*, *supra*, 452 F.3d at 250)—setting forth the requirements for establishing ineffective assistance. But having found ineffective assistance the Board is not thereby required to grant the petition to reopen. Satisfying the requirements of *Lozada* is a necessary condition to obtain a reopening on the basis of ineffective assistance of counsel rather than a sufficient one. In the absence of a rule requiring reopening upon the satisfaction of specified conditions, the decision to reopen is discretionary, and we have no jurisdiction to review the discretionary denial of a petition to reopen.

It is true that the Board has often granted such petitions when the requirements of *Lozada* are satisfied, see, e.g., *In re Bozena Zmijewska*, 24 I. & N. Dec. 87 (BIA 2007); *In re – K– & V- S-*, 21 I. & N. Dec. 879, 881 (BIA 1997); *In re Gustavo Alonzo Grijalva-Barrera*, 21 I. & N. Dec. 472, 473-74 (BIA 1996), but not always. See *In re Orozco-Solis*, 2006 BIA LEXIS 34 (2006); *In re Gary Fitzroy Beckford*, 22 I. & N. Dec. 1216 (BIA 2000); see also *In re Dean Maurice Morgan*, 2006 BIA LEXIS 36 (2006); *In re Robert Michael St. George Grant*, 2005 BIA LEXIS 24; *In re Lourdes Soriano-Vino in Removal Proceedings*, 2003 BIA LEXIS 17; *In re Ydalia Cruz-Garcia*, 22 I. & N. Dec. 1155 (BIA 1999). But that is consistent with there being no entitlement to reopen on the basis of ineffective assistance of counsel. Even if the alien received subprofessional assistance from

his lawyer, and as a result was prejudiced in his effort to avoid removal, the sheer passage of time since the removal proceeding, or the alien's culpable failure to seek prompt relief, might be thought to justify refusing to reopen; and weighing these considerations requires an exercise of discretion of the tribunal.

The complexity of the issues, or perhaps other conditions, in a particular removal proceeding might be so great that forcing the alien to proceed without the assistance of a competent lawyer would deny him due process of law by preventing him from "reasonably presenting his case." *Henry v. INS,* 8 F.3d 426, 440 (7th Cir. 1993); *Kay v. Ashcroft, supra,* 387 F.3d at 676; *Hernandez v. Mukasey,* 524 F.3d 1014, 1017 (9th Cir. 2008); *Aris v. Mukasey, supra,* 517 F.3d at 600; see also *Monjaraz-Munoz v. INS,* 327 F.3d 892, 897 (9th Cir. 2003). An alien resisting removal, which would deprive him of his liberty to remain in the United States, is entitled to due process, *Reno v. Flores,* 507 U.S. 292, 306 (1993); *Yamataya v. Fisher,* 189 U.S. 86, 100-01 (1903); *Bosede v. Mukasey,* 512 F.3d 946, 952 (7th Cir. 2008); *Torres v. INS,* 144 F.3d 472, 474 (7th Cir. 1998), which comprehends the right to present a defense. *Leguizamo-Medina v. Gonzales,* 493 F.3d 772, 775-76 (7th Cir. 2007); *Rodriguez Galicia v. Gonzales,* 422 F.3d 529, 539-40 (7th Cir. 2005).

Yet some cases say that if the alien is seeking merely discretionary relief he has no entitlement to remain in the United States and therefore a denial of relief does not invade his liberty. E.g., *Nativi-Gomez*

v. Ashcroft, supra, 344 F.3d at 807; *Mejia Rodriguez v. Reno,* 178 F.3d 1139, 1148 (11th Cir. 1999). The other cases that we have cited do not recognize the distinction, however, and to do so would be cutting things too fine. It is true that in *Cevilla v. Gonzales,* 446 F.3d 658, 662 (7th Cir. 2006), we said that while "Cevilla has a liberty interest in remaining in the United States, . . . prevailing on the issue of continuous physical presence in the United States would not give her any right to remain here. It would merely give her an opportunity to establish extreme hardship, which is an appeal to the government's discretion, rather than a substantive entitlement." But there is a difference between an issue and a remedy. Having created a reopening remedy that can defeat removal, the government cannot be allowed to destroy the remedy and so ensure removal by creating procedural roadblocks that prevent the alien from invoking the procedure. That would be a deprivation of liberty without due process of law, and therefore judicially reviewable even if the petition for review did not present a question of law but merely a question of fact (such as whether a notice of hearing had been sent to the alien), because the statute governing judicial review of rulings by the Board of Immigration Appeals allows review of a discretionary ruling that is claimed to deny a constitutional right. 8 U.S.C. § 1252(a)(2)(D); *Kucana v. Mukasey, supra,* 533 F.3d at 538.

The distinction between a question of fact on which a right depends, and a question of law, is vital in a case such as this, in which the infringement of a constitutional right is *not* alleged. Because it is not

alleged, our review is limited to rulings of law, and as we held in *Kucana* and *Huang* a factual determination by the Board—such as its determination that the alleged incompetence of the alien's lawyer in the removal proceeding did not prejudice the alien (she failed to show that the proceeding would have had a different outcome with a better lawyer)—is not a legal ruling and so does not confer jurisdiction on us.

The alien argues that her lawyer's failure to file an appeal brief with the Board in the removal proceeding created a presumption of prejudice. If there were such a presumption, and the Board ignored it, we would have review jurisdiction even though the Board, once its error was corrected, would still have discretionary authority to deny the petition to reopen. The error of law could have infected its consideration of the petition, and would have to be corrected before the Board could exercise discretion in a proper manner. E.g., *Koon v. United States,* 518 U.S. 81, 100 (1996); *Huang v. Mukasey, supra,* 534 F.3d at 620; *United States v. Diaz-Ibarra,* 522 F.3d 343, 348 (4th Cir. 2008); *Lin v. Mukasey,* 532 F.3d 596, 598 (7th Cir. 2008); compare *Jean v. Gonzales,* 435 F.3d 475, 480 (4th Cir. 2006).

But there is no such rule. The alien derives it from a series of Ninth Circuit cases that hold that the Board's failure to consider the alien's arguments because his lawyer did not file a brief (or did not appeal at all) establishes a presumption of prejudice. *Granados-Oseguera v. Gonzales,* 464 F.3d 993, 997 (9th Cir. 2006); *Ray v. Gonzales,* 439 F.3d 582, 587

(9th Cir. 2006); *Siong v. INS,* 376 F.3d 1030, 1037 (9th Cir. 2004); *Singh v. Ashcroft,* 367 F.3d 1182, 1189 (9th Cir. 2004); *Dearinger v. Reno,* 232 F.3d 1042, 1045 (9th Cir. 2000). There was no failure by the Board in this case. The Board does not require an alien who is appealing the adverse decision of an immigration judge to file a brief, and when no brief is filed the Board will still decide the merits of the appeal, and did so in this case. (The Board reserves the right to dismiss the appeal summarily if the alien, after indicating that he intends to appeal, fails to do so. 8 C.F.R. § 1003.1(d)(2)(i)(E). Sometimes the Board exercises the right, e.g., *In re Ibrahim Al-Hamidieh,* A95 518 117, 2007 WL 4699755 (BIA Dec. 4, 2007), sometimes not. E.g., *In re Jose Alfredo Rodriguez-Murrieta,* A90 116 459, 2007 WL 4699778 (BIA Nov. 30, 2007). To repeat, the Board did decide the merits of alien's appeal.) In deciding whether to reopen, the Board asked itself whether the removal proceeding might have come out differently had the alien been represented by competent counsel, and concluded that it would not have. That conclusion was not the answer to a question of law, but a discretionary determination.

We have no jurisdiction of the denial of the petition to reopen. The petition for review is therefore

DISMISSED.

9-10-08

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review

Decision of Board of Immigration Appeals

Falls Church, Virginia 22041

File: A21 530 826 – Chicago, ILDate: SEP 25 2007

In re: TERESA JEZIERSKI

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Paul Djurisic, Esquire

ON BEHALF OF DHS: Mirta J. Woodall
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(D)(i), I&N Act [8 U.S.C. § 1227(a)(1)(D)(i)] – Conditional resident status terminated

APPLICATION: Reopening

This case was last before the Board on June 7, 2007, when we dismissed the respondent's appeal of

an Immigration Judge's decision denying her application for a waiver of the joint petition filing requirement under section 216(c)(4)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1186a(c)(4)(B). The respondent has now filed a motion to reopen alleging ineffective assistance of her prior counsel. The motion will be denied.

In her motion to reopen, the respondent maintains that she was prejudiced by her former attorney's failure to seek a waiver of the joint petition filing requirement under section 216(c)(4)(A) of the Act, or file an application for cancellation of removal under section 240A(b) of the Act, 8 U.S.C. § 1229b(b). In addition, she argues that her prior counsel erred in failing to file a brief with the Board in support of her appeal.

Although the respondent has complied with the requirements set forth in *Matter of Lozada*, 19 I&N Dec.637 (BIA 1988), she has failed demonstrate prejudice flowing from the alleged ineffective assistance of counsel. *See Mojsilovic v. INS*, 156 F.3d. 743, 749 (7th Cir. 1998); *see also Pop v. INS*, 279 F.3d 457, 460-461 (7th Cir. 2002). The respondent's dissatisfaction with her former counsel's strategy in pursuing relief is not grounds for reopening based on ineffective assistance of counsel. *See Matter of B-B-*, 22 I&N Dec. 309, 310 (BIA 1998). Further, the respondent has offered no evidence in her motion to establish that she would have prevailed if her former attorney had pursed these forms of relief. To the contrary, after questioning the respondent regarding potential forms of relief, the

Immigration Judge concluded that she was ineligible for cancellation of removal based on her lack of a qualifying relative (Tr. at 12-17). *See* section 240A(b)(1)(D) of the Act. Finally, the respondent has failed to establish that the Board might have sustained her appeal of the Immigration Judge's decision had her prior counsel submitted a brief. The record reflects that the Board reviewed the Immigration Judge's decision and affirmed the results of the decision, deeming it the final agency decision. The respondent's motion to reopen fails to establish that the further development of the arguments contained in her Notice of Appeal (Form EOIR-26) might have led to a different result in this matter. Based on the forgoing, we conclude that the respondent has not shown prejudice flowing from the alleged errors. Accordingly, the following order will be entered.

ORDER: The respondent's motion to reopen is denied.

/s/
FOR THE BOARD

APPENDIX C

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of Board of Immigration Appeals

File: A21 530 826 – Chicago, ILDate: JUN 07 2007

In re: TERESA JEZIERSKI

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Daniel Rozenstrauch, Esquire

ON BEHALF OF SERVICE: Anastasie M. Senat
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(D)(i), I&N Act [8 U.S.C. § 1227(a)(1)(D)(i)] – Conditional resident status terminated

APPLICATION: Waiver under section 216(c)(4) of the Act; voluntary departure

On February 9, 2006, an Immigration Judge denied the respondent's request for a waiver of the joint petition filing requirement under section 216(c)(4)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1186a(c)(4), and granted her voluntary departure under section 240B(b) of the Act, 8 U.S.C. § 1229c(b). The respondent has appealed. The appeal will be dismissed.

The respondent adjusted her status to that of a permanent resident on a conditional basis on October 14, 1994, based upon her marriage to a United States citizen, which took place on January 18, 1994. On September 16, 1996, the respondent filed an Application for a Waiver of the Requirement for a Joint Petition to Remove the Conditional Basis of Alien's Permanent Resident Status (Form I-751), based on her marriage having been entered into in good faith. On October 27, 2003, the DHS denied the petition and terminated the respondent's conditional permanent resident status, based upon its finding that the respondent had not entered into the marriage in good faith (Exh. 2). The respondent was placed in removal proceedings, where she requested review of the DHS decision to terminate her conditional permanent resident status.

The Immigration Judge found, after considering the respondent [sic] testimony and her limited documentary evidence, that she lacked credibility, and her weak and unpersuasive testimony was not

overcome by sufficient corroborative evidence. He found the sudden break up of the marriage supports a conclusion that the marriage was entered into as a matter of convenience for immigration purposes (I.J. at 10).

The Immigration Judge concluded that the respondent failed to meet her burden of proof as required under the regulations, and that she had not established by a preponderance of the evidence that she intended to establish a life together with her husband at the time she married, and denied the respondent's request for a waiver of the joint petition under section 216(c)(4)(B) of the Act. (I.J. at 8).

Given this record, we find that the Immigration Judge correctly decided that the respondent did not enter into her marriage in good faith. Accordingly, we find that the respondent has failed to present sufficient evidence to show that her marriage was entered into in good faith, and find that the Immigration Judge acted properly in denying the respondent's application for a good faith waiver under section 216(c)(4)(B) of the Act.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent is permitted to voluntarily depart from the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time

as may be granted by the DHS. See section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 1240.26(c), (f). In the event the respondent fails to so depart, the respondent shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondent fails to depart the United States within the time period specified, or any extensions granted by the DHS, the respondent shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. See section 240B(d) of the Act.

/s/
FOR THE BOARD

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Chicago, Illinois

File: A 21 530 826 February 9, 2006

In the Matter of

TERESA JEZIERSKI,	)	
	)	IN REMOVAL
Respondent	)	PROCEEDINGS
	)	

CHARGE: I&N Act at Section 237(a)(1)(D)(i) - alien lawfully admitted for permanent residence on a conditional basis under Section 216 of the Act, whose status was terminated under such respective Section;

APPLICATION: A renewal of the Section 216(c)(4)(B) waiver of the joint petition requirements, or in the alternative, voluntary departure.

ON BEHALF OF THE RESPONDENT:	ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY:

Daniel Rozenstrauch 6333 North Milwaukee Avenue Chicago, Illinois 60646	Joseph Yeung Assistant Chief Counsel 55 East Monroe Street, Ste. 1700 Chicago, Illinois 60604

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a divorced 47-year-old female alien, native and citizen of Poland. Respondent first entered the United States as a non-immigrant visitor on May 29, 1993. The respondent remained in the United States beyond her authorized time, but married a citizen of the United States on January 15, 1994. The respondent was introduced to her husband through a friend of her uncle's, whom she was staying with. According to the respondent, she has always lived with her uncle at 4907 North Natoma, Chicago, Illinois, since she arrived. Shortly after she married her husband a visa petition was filed on her behalf and approved. Respondent appeared at an interview with her husband before the Immigration and Naturalization Service (Department of Homeland Security). This interview occurred in May of 1994. Subsequently, the respondent's application for permanent residence on a conditional basis was approved on October 14, 1994. However, by that time the marriage had essentially ended.

The respondent filed a waiver of the joint petition requirements with the Immigration and Naturalization Service under Section 216(c)(4)(B) on

September 16, 1996. She subsequently was represented by a variety of attorneys, but the first petition was filed by the Immigration Firm of Azulay and Azulay. The respondent appeared at an interview on her application but presented very little evidence showing that her marriage was bona fide from its inception. The respondent's case was continued for further interviews and to gather other supporting evidence.

In the interim, the respondent changed attorneys. It is unclear what the respondent stated was the length of her marriage to the Immigration and Naturalization Service when she was interviewed. The Government attorney suggests that during a 2002 interview, the respondent indicated that she separated from her husband in July of 1995. However, in a decision dated October 27, 2003, the director of the Immigration and Naturalization Service determined that the respondent's divorce decree had actually shown that she was separated from her husband in July of 1994 and that her documents filed in support of the petition reflected only matters that occurred after the date of separation.

For example, the decision indicated that the respondent submitted a 1997 registration renewal for her vehicle with both her name and her husband's name. However, the date of the registration was March 31, 1996, nearly two years after the marital separation.

The respondent submitted a Northwestern savings book, demonstrating that she maintained a joint savings account with her husband. However, the

district director of the Immigration Service discounted this evidence, finding that the documents submitted only reflected that the account was opened on September 10, 1994, two months after the parties had separated.

The respondent did file three brief affidavits from family and friends apparently executed on March 7, 1996 to support her waiver petition. However, the director found that the affidavits were suspect because they were written nearly two years after the respondent had separated from her spouse, yet the affidavits attempted to give the appearance of a bona fide marital relationship.

Thus, the respondent's waiver petition under Section 216(c)(4)(B) was denied by the director of the Immigration and Naturalization Service at Chicago on October 27, 2003. A Notice to Appear for removal proceedings was subsequently issued on October 28, 2003, charging the respondent with removability under Section 237(a)(1)(D)(i) of the Act.

The respondent returned to Court with a new attorney on April 14, 2004. The respondent, through counsel, admitted the first four allegations of fact contained in the Notice to Appear, denied allegation 5 concerning the termination of her permanent resident status, and denied the charge of removability. The respondent's attorney indicated that the respondent sought to renew the waiver of the joint petition under Section 216(c)(4)(B) before the Court. Accordingly, the respondent's case was scheduled for a final hearing on October 28, 2005. The hearing on October 28, 2005 had to be reset due to a request by the respondent's

attorney. Therefore, a final hearing was held on February 9, 2006.

THE ISSUE OF REMOVABILITY

In order to establish the respondent's removability, the Government attorney presented the decision terminating the respondent's residence status (see Exhibit 2). The respondent also acknowledged that she received a copy of this decision. I find, therefore, that the respondent's permanent resident status on a conditional basis was terminated and that she is subject to removal as charged in the Notice to Appear under Section 237(a)(1)(D)(i) of the Act by evidence which is clear and convincing.

Although the respondent's permanent resident status has been terminated, she does have the right to renew her request for a waiver of the joint petition under Section 216 of the Act.

Under Section 216(c)(4) of the Act, a respondent bears the burden of showing by the preponderance of the evidence that she merits a waiver of the joint petition requirements. See 8 C.F.R. Section 216.5(e).

THE EVIDENCE AT THE FINAL HEARING IN SUPPORT OF THE PETITION

At the final hearing held on February 9, 2006 the respondent testified in support of her waiver petition. The respondent testified that her husband was a friend of her uncle's and that she met him shortly after arriving in the United States. Respondent testified that he

proposed marriage in November of 1993 and that they were married in January of 1994. Respondent indicated that her husband worked as a cross-country truck driver and was based on Arkansas, but that he would return on a weekly basis or every week and-a-half to visit her at her uncle's home.

The respondent testified that in July of 1994, when she was not home, apparently her husband came home, emptied money from a bank account, took her car, and drove away. Respondent indicated that she had no contact with her husband after this incident. She also testified that she filed a complaint with the police for theft in July of 1994 because of what had occurred. Respondent provided no other affidavits or corroboration concerning the circumstances surrounding the break-up of her marriage. The respondent could not explain why her husband would suddenly return home, steal her car, empty a bank account, and disappear. The respondent did receive, she believes through her attorney, a petition for divorce that her husband filed. However, this petition was never acted upon and the respondent in 1996 filed a petition for dissolution of marriage with the Court in Chicago. This petition was granted.

In addition to her testimony concerning the marriage, the respondent presented a number of supporting documents (see Group Exhibit 4 and Group Exhibit 6). Included in these documents, according to the respondent, is a postcard addressed to her from her husband which she received when he was traveling in 1994. The respondent also identified a Valentine's

card, which is not dated but the respondent testified she received in February of 1994 from her husband.

The respondent also testified as to the document from the Northwest savings bank included in Group Exhibit 4, tab D. Respondent was unsure of why her and her husband's name was listed on this account or whether it was an opening of a joint account or closing of their account. However, the respondent admitted that she continued to receive interest on their joint account after the separation in July of 1994. Respondent testified that she was not sure when she closed the joint account.

The respondent, through her attorney, also offered as part of Group Exhibit 4, tab I, an IRS statement reflecting that she filed tax returns in 1994, 1995, and 1996 as single. When asked to explain why she would file tax returns in this status if in fact she was married, respondent answered that her marriage was "very short." The respondent really had no other explanation for why she filed single and not married, or married filing separately.

The Government attorney opposes the respondent's application for a waiver of the joint petition contending that the respondent has failed to meet her burden of proof of establishing that her marriage was bona fide at the inception. The Government attorney contends that the respondent's documentation was created in 1996 and only reflects joint accounts after the period the respondent separated from her husband. The Government attorney believes that the lack of documentation

impeaches the respondent's claim that her marriage was entered into in good faith. The Government attorney also does not believe the respondent's testimony is credible, given her testimony surrounding the circumstances of her marriage and the break-up of the marriage.

The respondent's attorney argues that if the respondent's marriage was a sham from the inception she would not have sought to file a divorce petition for dissolution of the marriage in 1996, nor would her husband have instituted dissolution proceedings in 1994. Respondent's attorney believes that seeking a dissolution shortly after the marriage is entered into suggests that the marriage was bona fide rather than a sham.

ANALYSIS AND CONCLUSION

When considering whether a marriage is bona fide and entered into in good faith, the intentions of the parties are controlling. The focus of such an inquiry is whether the parties of the marriage intended to establish a life together at the time they married. See Bark v. INS, 511 F.2d. 1200 (9th Cir. 1975) and Matter of McKee, 17 I&N Dec. 332 (BIA 1980). The Board of Immigration Appeals has held that evidence which is relevant to this intent includes proof of joint property leases, tax forms, bank accounts, a period of courtship, a wedding ceremony, and testimony of mutual experiences and a shared life. See Matter of Laureano, Int. Dec. 2951 (BIA 1993), citing Matter of Phillis, 15 I&N Dec. 385 (BIA 1975).

After careful consideration of the record in its entirety, I find respondent has failed to meet her burden of proof as required under the regulations. In this case the respondent has not established by the preponderance of the evidence, that she intended to establish a life together with her husband at the time she married. Thus, I conclude, that the respondent's request for a waiver of the joint petition under Section 216(c)(4)(B) of the Act must be denied.

In considering the application, this Court must judge the credibility of the respondent's testimony, its overall rationality, the internal consistency of the respondent's story, and the way the evidence and testimony hang together. In this case, after considering the respondent's testimony and her limited documentary evidence, I do not find the respondent's testimony credible and I find that she has not overcome her weak and unpersuasive testimony by sufficient corroborative evidence.

First, the respondent's testimony concerning any courtship was missing in this case. Respondent admitted that she was introduced to her husband by her uncle's friend. The respondent testified that she resided with her husband shortly after coming to the United States in 1993. However, she never described any period of courtship, or any reason why her husband proposed marriage in November of 1993. The facts suggest that the respondent's husband was a cross-country truck driver who worked out of state most of the time. The absence of any meaningful courtship and the timing of the respondent's marriage casts doubt on her testimony that the marriage was entered into in good faith.

The respondent's testimony was also weak and unpersuasive concerning the reasons for the break-up. The respondent acknowledged that her husband lived out of state most of the time and visited her on occasion. However, she described no reason why he would suddenly return home in July of 1994, take her car without permission, empty a bank account, and disappear. The respondent provided no testimony or corroboration through witnesses or affidavits as to why the marriage suddenly ended. The sudden break-up of the respondent's marriage supports a conclusion that the marriage was entered into as a matter of convenience for immigration purposes.

The respondent's documentary evidence failed to overcome the respondent's weak and unpersuasive testimony. As noted by the district director of the Immigration Service, most of the evidence was procured in 1996 and established only that the respondent maintained a joint account with her husband after their period of separation.

The fact that the respondent maintained registration of a car in joint names, but the registration was issued in 1996, suggests that the respondent was still trying to maintain the appearance that she was residing with her husband. The respondent could not explain why she would register a vehicle in 1996 under both names when in fact she had separated from her husband in July of 1994 and had never heard from him again. Similarly, the maintaining of a joint bank account under this type of circumstance, suggests that

the account was maintained in both names only for immigration purposes.

I also find support for the conclusion of the district director of the INS concerning the affidavits that the respondent filed. These affidavits were not updated and no additional affidavits were presented to the Immigration Court. The Government attorney did file the supporting affidavits as part of the respondent's petition (see Exhibit 5). These affidavits appear to be general in nature, were obtained in 1996 from family and friends, and only support the fact that the respondent entered into a marriage with her husband on January 15, 1994.

Although some of these affidavits suggest that they have had contact with the respondent and her husband after the marriage date, they are too general to support a finding that the marriage was bona fide from its inception. Certainly the affidavits do not reflect that the respondent's husband suddenly disappeared in July of 1994, stole the respondent's car, and a theft report was filed by the respondent against her husband. Thus, these affidavits appear to be suspect and this Court will give them little weight.

Conspicuously absent from the record is really any evidence that the respondent entered into a bona fide marriage. Apart from the respondent's own testimony, there was no testimony from witnesses that she resided together with her husband for any period of time at all. The respondent acknowledged that he lived most of the time out of state and that she only saw him occasionally when he returned to Chicago. This Court

does not believe that the respondent's joint bank account shows that they ever co-mingled assets or maintained a life together.

Another factor is the issue of tax returns. Here, the respondent acknowledged that she continued to file as a single woman even after her marriage in 1994, despite the fact that she maintained her marriage until 1996. The respondent's explanation for continuing to file as a single woman was not satisfactory to the Court. Simply the fact that she was only married for a short period of time would not support using a single person as a filing status.

Under the regulations, the respondent bears the burden of proof of showing that she entered into a bona fide marriage. The respondent must establish that she intended to establish a life together with her husband from its inception. Here, the evidence is inadequate and the respondent has failed to meet her burden of proof.

Based upon the foregoing, this Court concludes that the respondent has failed to show that she entered into a bona fide marriage and therefore her request for a waiver of the joint petition under Section 216(c)(4)(B) of the Act must be denied.

Accordingly, the following order will be entered.

ORDER:

IT IS ORDERED that the respondent's application for a Section 216(c)(4)(B) of the Act waiver be denied.

IT IS FURTHER ORDERED that the respondent be granted voluntary departure in lieu of removal if she departs the United States on or before April 9, 2006.

IT IS FURTHER ORDERED that to qualify for voluntary departure, the respondent post a $500 departure bond with the Department of Homeland Security within five days of this decision.

IT IS FURTHER ORDERED: that if the respondent fails to post the voluntary departure bond or fails to depart the United States within the time set, then this privilege of voluntary departure shall be withdrawn and the following order shall thereupon become immediately effective: respondent shall be deported or removed from the United States to Poland on the charge contained in the Notice to Appear.

/s/
ROBERT D. VINIKOOR
Immigration Judge

APPENDIX E

U.S. DEPARTMENT OF JUSTICE
IMMIGRATION COURT
CHICAGO, IL 60603

In the Matter of:
Teresa Jezierski
Respondent

File No: A21-530-826

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 2-9-06. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[ ] The respondent was ordered removed from the United States to _____ or in the alternative to _____.

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to _____ alternative to _____.

[X] Respondent's application for voluntary departure was granted until 4-9-06 upon posting a bond in the amount of $500.00 with an alternate order of removal to Poland.

[ ] Respondent's application for asylum was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for withholding of removal was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for cancellation of removal under section 240A(a) was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for cancellation of removal was ( ) granted under section 240A(b)(1) ( ) granted under section 240A(b)(2) ( ) denied ( ) withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[X] Respondent's application for a waiver under section 216(c)(4)(B) of the INA was ~~( ) granted~~ (X) denied ~~( ) withdrawn~~ or ( ) other.

[ ] Respondent's application for adjustment of status under section _____ of the INA was ( ) granted ( ) denied ( ) withdrawn. If granted, it was ordered that respondent be issued all appropriate documents necessary to given effect to this order.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $_____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[ ] Other _____

Date: 2-9-06

Administrative Control Court; Immigration Court, 55 East Monroe, Suite 1900, Chicago, IL 60603

Appeal: /RESERVED (A/~~B~~)

APPEAL DUE BY: 3-13-06

/s/
Robert D. Vinikoor
Immigration Judge

Alien Number: 21-530-826 Alien name: JEZIERSKI, TERESA

LIMITATIONS ON DISCRETIONARY RELIEF FOR FAILURE TO APPEAR

( ) 1. You have been scheduled for a removal hearing, at the time and place set forth on the attached sheet. Failure to appear for this hearing other than because of exceptional circumstances beyond your control** will result in your being found ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A, below) for a period of ten (10) years after the date of entry of the final order of removal.

( ) 2. You have been scheduled for an asylum hearing, at the time and place set forth on the attached notice. Failure to appear for this hearing other than because of exceptional circumstances beyond your control** will result in your being found ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A, Below) for a period of ten (10)

years from the date of your scheduled hearing.

( ) 3. You have been granted voluntary departure from the United States pursuant to section 2408 of the Immigration and Nationality Act, and remaining in the United States beyond the authorized date will result in your being found ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A, Below) for ten (10) years from the date of the scheduled departure. Your Voluntary departure bond, if any, will also be breached. Additionally, if you fail to voluntarily depart the United States within the time period specified, you shall be subject to a civil penalty of not less than $1000 and not more than $5000.

**the term "exceptional circumstances" refers to circumstances such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances.

A. THE FORMS OF RELIEF FROM REMOVAL FOR WHICH YOU WILL BECOME INELIGIBLE ARE:

1) Voluntary departure as provided for in section 240B of the Immigration and Nationality Act;
2) Cancellation of removal as provided for in section 240A of the Immigration and Nationality Act; and

3) Adjustment of status or change of status as provided for in Section 245, 248 or 249 of the Immigration and Nationality Act.

This written notice was provided to the alien in English. Oral notice of the contents of this notice must be given to the alien in his/her native language, or in a language he/she understands by the Immigration Judge.

Date: Feb 9, 2006

Immigration Judge: /s/

or Court Clerk: _____

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)

TO: [X] ALIEN [ ] ALIEN c/o Cust odial Officer [ ] ALIEN's ATT/REP [ ] INS

DATE: 2/9/06 BY: COURT STAFF /s/

ATTACHMENTS: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

---------- V6

120 (2)

Supreme Court, U.S.
FILED
FEB 17 2009
OFFICE OF THE CLERK

No. 08-656

In the Supreme Court of the United States

TERESA JEZIERSKI, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

EDWIN S. KNEEDLER
Acting Solicitor General
Counsel of Record
MICHAEL F. HERTZ
Acting Assistant Attorney General
DONALD E. KEENER
ROBERT N. MARKLE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly held that it lacked jurisdiction to review the Board of Immigration Appeals' denial of petitioner's motion to reopen immigration proceedings under 8 U.S.C. 1252(a)(2)(B)(ii) and (D).

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In the Supreme Court of the United States

No. 08-656

TERESA JEZIERSKI, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 543 F.3d 886. The decision of the Board of Immigration Appeals denying petitioner's motion to reopen (Pet. App. 11a-13a) is unreported. A prior decision of the Board of Immigration Appeals dismissing petitioner's appeal (Pet. App. 14a-17a) is unreported. The decision of the immigration judge (Pet. App. 18a-30a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 2008. A petition for a writ of certiorari was filed on November 17, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1996, Congress amended the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to expedite the removal of criminal and other illegal aliens from the United States. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. As relevant here, Congress amended the INA to limit judicial review of certain discretionary decisions of the Attorney General. As amended, the relevant section of the INA now provides that no court shall have jurisdiction to review any

> decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

8 U.S.C. 1252(a)(2)(B)(ii). The phrase "this subchapter" refers to Title 8 of the United States Code, Chapter 12, Subchapter II, which is codified at 8 U.S.C. 1151-1381 and pertains broadly to immigration matters. See *Van Dinh* v. *Reno*, 197 F.3d 427, 433 (10th Cir. 1999).

In 2005, Congress amended the INA to include the following provision:

> Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. 1252(a)(2)(D), as added by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310.

b. The Board of Immigration Appeals (Board) may reopen any proceedings in which it has previously entered a decision. 8 U.S.C. 1229a(c)(7). A motion to reopen must be based on previously unavailable, material evidence. 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c). Subject to limited exceptions, an alien may file only one motion to reopen, and such a motion must be filed within 90 days of the entry of the final order of removal. 8 U.S.C. 1229a(c)(7)(A) and (C)(i); 8 C.F.R. 1003.2(c)(2).

Based on a strong interest in finality, motions to reopen are disfavored, and the movant must meet a heavy burden to satisfy these requirements. *INS* v. *Abudu*, 485 U.S. 94, 107-108, 110 (1988); *In re Coelho*, 20 I. & N. Dec. 464, 473 (B.I.A. 1992). That is because "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *INS* v. *Doherty*, 502 U.S. 314, 323 (1992). The Board has broad discretion in adjudicating a motion to reopen, and it "has discretion to deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." 8 C.F.R. 1003.2(a); see *Abudu*, 485 U.S. at 110.

c. If an alien applies for adjustment of status to that of a lawful permanent resident based on a marriage to a United States citizen, and the marriage is less than two years old, adjustment of status is granted on a conditional basis. See 8 U.S.C. 1186a(a)(1) and (g)(1). The conditional status remains in effect for a two-year period, after which the alien must satisfy additional requirements to remove the conditional basis of her legal residency, including a joint petition and an interview with her spouse. 8 U.S.C. 1186a(c)(1). If the spouse

refuses to participate in this process, however, the alien may file the petition alone and request a waiver of the joint-filing requirement. See 8 U.S.C. 1186a(c)(4).

In order to be eligible for such a waiver, the alien must establish one of the following:

> (A) extreme hardship would result if such alien is removed,
>
> (B) the qualifying marriage was entered into in good faith by the alien spouse, but the qualifying marriage has been terminated (other than through the death of the spouse) and the alien was not at fault in failing to meet the requirements of paragraph (1) [providing for joint filing], or
>
> (C) the qualifying marriage was entered into in good faith by the alien spouse and during the marriage the alien spouse or child was battered by or was the subject of extreme cruelty perpetrated by his or her spouse * * * and the alien was not at fault in failing to meet the requirements of paragraph (1).

8 U.S.C. 1186a(c)(4). Even if the alien establishes eligibility for a waiver, the ultimate determination whether to grant a waiver is entrusted to the discretion of the Attorney General and the Secretary of Homeland Security. *Ibid.*; see 8 U.S.C. 1103.

2. Petitioner is a native and citizen of Poland. Pet. App. 19a. She was admitted to the United States as a non-immigrant visitor in May 1993 and has remained here beyond the time authorized. *Ibid.* In January 1994, she married a United States citizen. *Ibid.*

Petitioner's husband filed an immigrant visa petition with the former Immigration and Naturalization Service

(INS)[1] on her behalf, and petitioner filed an application for permanent residence on a conditional basis. Pet. App. 19a. In May 1994, petitioner and her husband appeared for an INS interview. *Ibid.* By July 1994, petitioner and her husband had separated and were living apart. *Id.* at 20a.

In October 1994, the INS approved petitioner's application and adjusted her status to that of a permanent resident on a conditional basis. Pet. App. 19a. In September 1996, petitioner petitioned the INS to remove the conditions on her permanent resident status, and she sought a waiver of the joint-petition requirement under 8 U.S.C. 1186a(c)(4)(B), alleging that she entered into her marriage in good faith but that she was in the process of getting divorced. Pet. 19a-20a; see Administrative Record (A.R.) 328. In February 1997, petitioner's divorce was finalized. A.R. 310-312, 332.

In October 2003, the Department of Homeland Security (DHS) denied petitioner's application for a waiver. Pet. App. 20a. It explained that, at the time petitioner filed her waiver application, she and her husband had not yet been divorced, so that she was "not eligible for a waiver based upon a good-faith marriage that terminated in divorce" under 8 U.S.C. 1186a(c)(4)(B). A.R. 332. Moreover, DHS concluded that even if petitioner had been eligible for such a waiver, she failed to prove that her marriage was bona fide. *Ibid.* DHS observed that petitioner and her husband "separated and began living apart * * * just seven months after [their] marriage," and that petitioner and her husband had resided

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[1] On March 1, 2003, the INS ceased to exist as an agency within the Department of Justice and its enforcement functions were transferred to the Department of Homeland Security, pursuant to the Homeland Security Act of 2002, 6 U.S.C. 101 *et seq.*

together during only one month of their marriage. *Ibid.* DHS further noted that, at the time petitioner was granted conditional permanent-resident status, she and her husband had already separated and were living apart. *Ibid.* Based on the evidence submitted, DHS concluded that petitioner's marriage was "a marriage of convenience entered into solely to gain an immigration benefit." *Ibid.* DHS therefore terminated petitioner's conditional permanent-resident status. A.R. 333; Pet. App. 21a. DHS then charged petitioner with being removable as an alien whose conditional permanent-resident status had been terminated. Pet. App. 18a; A.R. 339-340; see 8 U.S.C. 1227(a)(1)(D).

Petitioner appeared with counsel before an immigration judge (IJ). She denied that she was removable as charged and renewed her request for a waiver under 8 U.S.C. 1186a(c)(4)(B) by submitting her waiver application to the IJ for reconsideration. A.R. 208-210. The IJ noted that DHS had determined that petitioner's marriage was not bona fide, but continued her hearing for almost two years in order to permit her to obtain evidence to show that her marriage was bona fide. A.R. 211.

The IJ held a hearing on petitioner's waiver application in February 2006. Petitioner appeared with counsel and testified on her own behalf. When asked by the IJ whether petitioner would seek any form of relief other than the renewal of her waiver petition, her counsel said that he did not know whether she would be eligible for cancellation of removal based on the length of her stay in the United States. A.R. 219. The IJ asked petitioner several questions to determine whether she would be eligible for cancellation of removal and concluded that she was not eligible for that relief because she lacked a

qualifying relative (spouse, parent, or child) to whom her removal would pose a hardship. A.R. 219-224; see 8 U.S.C. 1229b(b)(1)(D) (to be eligible for cancellation of removal, alien must demonstrate, *inter alia*, "that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence").

The IJ denied petitioner's waiver application. Pet. App. 18a-30a. He first determined that petitioner was removable as charged because DHS terminated her conditional permanent-resident status. *Id.* at 22a. The IJ then reviewed petitioner's testimony and the documentary evidence she submitted, *id.* at 22a-24a, and concluded that petitioner failed to establish that her marriage was bona fide, *id.* at 26a. The IJ found that petitioner was not credible and that she did not "overcome her weak and unpersuasive testimony by sufficient corroborative evidence." *Ibid.* The IJ explained that there was no evidence of any period of courtship prior to the marriage, *ibid.*; that "the timing of [her] marriage cast[] doubt on her testimony that the marriage was entered into in good faith," *ibid.*; and that petitioner provided "unpersuasive" testimony regarding the reasons for the break-up of her marriage, *id.* at 27a.

The IJ also noted that petitioner's documentary evidence did not support the view that her marriage was bona fide, because the fact that petitioner maintained a joint savings account with her husband and registered a car with him after they separated "suggest[ed] that [petitioner] was still trying to maintain the appearance that she was residing with her husband." Pet. App. 27a. The IJ also determined that the affidavits petitioner provided from family and friends were "general in na-

ture," were obtained after petitioner and her husband separated, did not establish that petitioner "resided together with her husband for any period of time at all," and "only support[ed] the fact that [petitioner] entered into a marriage with her husband on January 15, 1994." *Id.* at 28a. The IJ also pointed out that petitioner filed her income taxes using single status from 1994-1996, for the entire time she was married. *Id.* at 29a. The IJ concluded that the record lacks "really any evidence that [petitioner] entered into a bona fide marriage," and the IJ therefore denied her request for waiver of the joint-petition requirement under 8 U.S.C. 1186(c)(4)(B). Pet. App. 28a-29a; see *id.* at 27a (marriage was "a matter of convenience for immigration purposes").

The IJ then granted petitioner's request for voluntary departure and advised her of the consequences of failing to depart within the voluntary departure period, including that she would be rendered ineligible for various forms of discretionary relief for a period of ten years. Pet. App. 31a-35a.

3. Petitioner's counsel filed a notice of appeal with the Board, stating that petitioner intended to challenge the IJ's denial of her Section 1186a(c)(4)(B) waiver request on the ground that the record supported petitioner's contention that her marriage was bona fide. A.R. 168. Although petitioner's counsel stated in the notice of appeal that he intended to file an opening brief, *ibid.*, he apparently did not do so.

The Board affirmed. Pet. App. 14a-17a. It reviewed petitioner's testimony and evidence, noted that the IJ found that petitioner "lacked credibility," and concluded that the IJ "correctly decided that [petitioner] did not enter into her marriage in good faith" and therefore correctly denied her request for a waiver under 8 U.S.C.

1186a(c)(4)(B). Pet. App. 15a-16a. The Board then upheld the IJ's grant of voluntary departure and informed petitioner that she was required to depart the United States within 60 days or she would be ineligible for various forms of discretionary relief for ten years. *Id.* at 16a-17a.

4. Petitioner retained new counsel and filed a motion to reopen her immigration proceedings. A.R. 18-27. In the motion, petitioner alleged that her prior attorney had been ineffective because he failed to request a hardship waiver under 8 U.S.C. 1186a(c)(4)(A), failed to request cancellation of removal, and failed to file a brief in support of her appeal to the Board. A.R. 19-20. Petitioner also moved to stay or extend her period of voluntary departure. A.R. 23-27. Petitioner did not allege, either in her motion to reopen or in her reply brief in support of the motion, that she was prejudiced because the outcome would have been different if her former attorney had sought one of the alternative forms of relief or filed an appellate brief.

The Board denied petitioner's motion to reopen. Pet. App. 11a-13a. It explained that, although petitioner complied with the procedural requirements for raising an ineffective assistance claim that the Board established in *In re Lozada*, 19 I. & N. Dec. 637 (B.I.A. 1988), "she has failed to demonstrate prejudice flowing from the alleged ineffective assistance of counsel." Pet. App. 12a (citing *Mojsilovic* v. *INS*, 156 F.3d 743, 749 (7th Cir. 1998), and *Pop* v. *INS*, 279 F.3d 457, 460-461 (7th Cir. 2002)). The Board noted that petitioner's "dissatisfaction with her former counsel's strategy in pursuing relief is not grounds for reopening based on ineffective assistance of counsel." *Ibid.*

The Board observed that petitioner "offered no evidence in her motion to establish that she would have prevailed if her former attorney had pursued these forms of relief." Pet. App. 12a. With respect to petitioner's claim that her attorney should have requested other forms of relief, the Board determined that there was no prejudice, because "after questioning [petitioner] regarding potential forms of relief, the Immigration Judge concluded that she was ineligible for cancellation of removal based on her lack of a qualifying relative." *Id.* at 12a-13a. With respect to petitioner's claim based on her former attorney's failure to file an appellate brief, the Board also determined that petitioner failed to show prejudice, because "[t]he record reflects that the Board reviewed the Immigration Judge's decision and affirmed the results of the decision," and petitioner did not explain how "further development of the arguments contained in her Notice of Appeal * * * might have led to a different result." *Id.* at 13a.

The Board apparently did not rule on petitioner's motion to stay or extend her period of voluntary departure. Petitioner has not demonstrated that she departed from the United States within the time allowed under her voluntary departure order.

5. The court of appeals dismissed petitioner's petition for review, holding that it lacked jurisdiction to review the Board's denial of petitioner's motion to reopen under 8 U.S.C. 1252(a)(2)(B)(ii). Pet. App. 1a-10a.[2] The court explained that it had held in several recent decisions that "there is no power of judicial review of petitions to reopen removal proceedings unless the petition presents a question of law" or a constitutional issue be-

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[2] The government did not argue that the court lacked jurisdiction.

cause the Board's decision to grant or deny a motion to reopen is a "discretionary decision." *Id.* at 2a.

The court then determined that petitioner did not raise any question of law, because the Board has not adopted a legal rule "that entitles the alien to reopen his removal proceeding on the basis of ineffective assistance of counsel," even if she has satisfied the procedural requirements the Board adopted in *Lozada*. Pet. App. 5a-6a.[3] Rather than alleging a legal or constitutional error, the court observed, petitioner's claim amounted to a challenge to the Board's "exercise of discretion." *Id.* at 7a; see *id.* at 10a.

ARGUMENT

Petitioner seeks review of the court of appeals' determination that 8 U.S.C. 1252(a)(2)(B)(ii) precluded it from reviewing the Board's denial of her motion to reopen immigration proceedings. Pet. i. The courts of appeals have divided on that question, but review would be premature at this time. Moreover, this case would not be a suitable vehicle for addressing the existing tensions in lower court authority. Because petitioner could not in any event show that the Board abused its discretion in denying the motion to reopen and could not show that she would receive a waiver of the joint-petition requirement or cancellation of removal, petitioner cannot ultimately succeed on the merits of her challenge to the removal order. The petition therefore should be denied. In the alternative, the Court should grant the petition, vacate the judgment below, and remand the case for further consideration in light of the government's position stated herein.

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[3] The court noted that petitioner did not raise any constitutional claim. Pet. App. 8a-9a.

1. a. In the decision below, the Seventh Circuit held that it lacks jurisdiction to consider the Board's denial of a motion to reopen under 8 U.S.C. 1252(a)(2)(B)(ii). Pet. App. 2a (citing *Kucana* v. *Mukasey*, 533 F.3d 534 (7th Cir. 2008), petition for cert. pending, No. 08-911 (filed Oct. 3, 2008), and *Huang* v. *Mukasey*, 534 F.3d 618 (7th Cir.), cert. denied, 129 S. Ct. 737 (2008)). In reaching that conclusion, the Seventh Circuit has reasoned that the Board's decision to grant or deny a motion to reopen is a "decision or action * * * the authority for which is specified under" the relevant subchapter of the INA (8 U.S.C. 1151-1381) to be in the discretion of the Attorney General, 8 U.S.C. 1252(a)(2)(B)(ii), because it is based on a regulation that the Attorney General promulgated to authorize the Board to reopen proceedings, which in turn specifies that the power to grant or deny a motion to reopen is within the discretion of the Board. *Kucana*, 533 F.3d at 536-537; see Pet. App. 2a-3a.

The Third, Fifth, Eighth, Ninth, and Tenth Circuits have reached a contrary conclusion, holding that 8 U.S.C. 1252(a)(2)(B)(ii) does not bar judicial review of the Board's denial of a motion to reopen. See *Jahjaga* v. *Attorney Gen.*, 512 F.3d 80, 82 (3d Cir. 2007); *Zhao* v. *Gonzales*, 404 F.3d 295, 302-303 (5th Cir. 2005); *Miah* v. *Mukasey*, 519 F.3d 784, 789 n.1 (8th Cir. 2008); *Medina-Morales* v. *Ashcroft*, 371 F.3d 520, 528-529 (9th Cir. 2004); *Infanzon* v. *Ashcroft*, 386 F.3d 1359, 1361-1362 (10th Cir. 2004). The Fifth, Eighth, and Ninth Circuits have explained that a decision by the Board to grant or deny a motion to reopen is not a decision "the authority for which is specified" under the relevant subchapter of the INA "to be in the discretion of the Attorney General," 8 U.S.C. 1252(a)(2)(B)(ii), because the Board's discretionary authority to act on a motion to

reopen is specified in a regulation, not a statutory provision within the relevant subchapter itself. See *Zhao*, 404 F.3d at 302-303; *Miah*, 519 F.3d at 789 n.1; *Medina-Morales*, 371 F.3d at 528-529.

The Tenth Circuit has reached the same result through a different analysis, concluding that Section 1252(a)(2)(B)(ii) does not preclude jurisdiction over a motion to reopen because "[a] motion to reopen * * * is separately authorized by 8 U.S.C. § 1229a(c)(6)" and because 8 U.S.C. 1252(b)(6), which directs courts to consolidate appeals of denials of motions to reopen with appeals of the order sought to be reopened, assumes that courts of appeals generally have jurisdiction to review denials of motions to reopen. *Infanzon*, 386 F.3d at 1361-1362. The Third Circuit has come to the same conclusion in the context of a motion to reissue a Board decision, which it treated as a motion to reopen. See *Jahjaga*, 512 F.3d at 82.[4]

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[4] Contrary to petitioner's suggestion (Pet. 13), there are not ten circuits that have rejected the argument that Section 1252(a)(2)(B)(ii) precludes judicial review of the denial of a motion to reopen. Many of the cases petitioner cites (Pet. 13-14) do not mention jurisdiction at all. See *Belle* v. *United States Att'y Gen.*, No. 08-11146, 2008 WL 4649392 (11th Cir. Oct. 22, 2008) (unpublished); *Soto* v. *Mukasey*, No. 08-72029, 2008 WL 4613593 (9th Cir. Oct. 17, 2008) (unpublished); *Zhang* v. *Mukasey*, 543 F.3d 851 (6th Cir. 2008); *Dioubate* v. *Mukasey*, 296 Fed. Appx. 335 (4th Cir. 2008) (unpublished); *Zequiraj* v. *Mukasey*, 296 Fed. Appx. 206 (2d Cir. 2008) (unpublished); *Meda-Morales* v. *Mukasey*, 293 Fed. Appx. 431 (8th Cir. 2008) (unpublished); *Sunarno* v. *Mukasey*, 293 Fed. Appx. 8 (1st Cir. 2008) (unpublished), petition for cert. pending, No. 08-7730 (filed Dec. 9, 2008). Of the cases that mention jurisdiction, several do not address the question whether 8 U.S.C. 1252(a)(2)(B)(ii) precludes judicial review of the Board's denial of a motion to reopen under 8 U.S.C. 1252(a)(2)(B)(ii). See *Alvarado-Vallardes* v. *Mukasey*, 296 Fed. Appx. 419, 420 (5th Cir. 2008) (unpublished); *Baig* v. *Attorney Gen.*, No. 08-1073, 2008 WL 4573006, at *1 (3d Cir. Oct. 15, 2008) (unpublished);

Some circuits that have held that Section 1252(a)(2)(B)(ii) does not automatically bar judicial review of the denial of a motion to reopen have stated that the court nonetheless lacks jurisdiction if the INA bars judicial review of the underlying order that the alien seeks to reopen. See, *e.g.*, *Assaad* v. *Ashcroft*, 378 F.3d 471, 474-475 (5th Cir. 2004); *Sarmadi* v. *INS*, 121 F.3d 1319, 1322 (9th Cir. 1997). The discretionary forms of relief petitioner seeks (waiver under 8 U.S.C. 1186a(c)(4)(A) and (B) and cancellation of removal under 8 U.S.C. 1229b(b)) are "decision[s] or action[s]" the authority for which is specified under the relevant subchapter to be in the discretion of the Attorney General. 8 U.S.C. 1252(a)(2)(B)(ii). Thus, it seems likely that other courts besides the Seventh Circuit would decline to exercise jurisdiction over petitioner's claim. Nonetheless, because the court below did not consider such

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Lopez v. *Mukasey*, No. 07-9549, 2008 WL 3094052, at *2 (10th Cir. Aug. 7, 2008) (unpublished). Moreover, as indicated, many of the cited decisions are unpublished and do not establish circuit precedent. Further, *Panjwani* v. *Gonzales*, 401 F.3d 626 (5th Cir. 2005), addresses IIRIRA's transitional rules, not the current jurisdictional provisions in the INA. *Id.* at 629-632. Therefore, none of those decisions conflicts with the decision below on the question whether Section 1252(a)(2)(B)(ii) bars judicial review of the denial of a motion to reopen.

Petitioner cites (Pet. 19-23) various cases addressing whether Section 1252(b)(2)(B)(ii) bars judicial review of *other* types of claims (such as challenges to denials of motions for continuances or motions for reconsideration). Those cases, however, do not shed light on whether there is jurisdiction over petitioner's claim, which is limited to the specific context of motions to reopen. In any event, there does not appear to be any circuit split on the question whether Section 1252(b)(2)(B)(ii) bars review of the denial of a motion for reconsideration, because of all of the cases petitioner cites (Pet. 22), only one case directly addresses that question. See *Johnson* v. *Mukasey*, 546 F.3d 403, 404 (7th Cir. 2008).

an argument, and because there are other reasons why further review is appropriate in this case, it is unnecessary to address that question.

b. After reexamining its prior filings on this issue, the government has concluded that the majority position represents the better reading of the statute. The relevant statutory text requires that the "authority" for the "decision or action" at issue—here, the denial of a motion to reopen immigration proceedings—be "specified under this subchapter [Subchapter II of Chapter 12 of Title 8] to be in the discretion of the Attorney General." 8 U.S.C. 1252(a)(2)(B)(ii).

Although the relevant statutory "subchapter" provides that "[a]n alien may file one motion to reopen," 8 U.S.C. 1229a(c)(7)(A); specifies that the motion "shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material," 8 U.S.C. 1229a(c)(7)(B); and provides a deadline for the filing of such a motion, 8 U.S.C. 1229a(c)(7)(C), it does not "specif[y]" that motions to reopen may be granted "in the discretion of the Attorney General." Rather, a regulation provides that the Board has broad discretion to grant or deny a motion to reopen. See 8 C.F.R. 1003.2(a) ("The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board * * *. The Board has discretion to deny a motion to reopen even if the party moving has made out a *prima facie* case for relief."); see also 8 C.F.R. 1003.23(b)(3) (IJ has discretion to grant or deny motion to reopen). Given the general presumption in favor of judicial review, *INS* v. *St. Cyr*, 533 U.S. 289, 298 (2001), and the terms of Section 1252(a)(2)(B)(ii), the government agrees with the majority of circuit courts that the

Board's discretionary decision to deny a motion to reopen is not covered by the jurisdictional bar in 8 U.S.C. 1252(a)(2)(B)(ii). The government did not argue otherwise to the court below. See Gov't C.A. Br. 1, 7-12.[5]

2. As discussed above, the courts of appeals are divided with respect to the underlying question upon which petitioner seeks review. Despite petitioner's contrary assertion, Pet. 12, this Court's plenary consideration is not warranted at this time, because the conflict in lower-court authority may well resolve itself without this Court's intervention, and because the issue concerns a narrow issue of reviewability that is unlikely to affect the outcome of many cases.

In its decision in this case, the Seventh Circuit relied upon its prior decision in *Kucana*. In that case, the court overruled *Singh* v. *Gonzales*, 404 F.3d 1024, 1026-1027 (7th Cir. 2005), which held that Section 1252(a)(2)(B)(ii) does not preclude judicial review of the denial of a motion to reopen immigration proceedings.

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[5] Because the United States agrees that there is jurisdiction over petitioner's claim that the Board abused its discretion in denying her motion to reopen, there is no need to consider whether judicial review is available on the alternative ground that petitioner raises a "question[] of law" under 8 U.S.C. 1252(a)(2)(D). It is worth noting, however, that the court below did not opine on whether a "mixed question of law and fact" (Pet. 23-24) qualifies as a "question[] of law." Moreover, to the extent that petitioner now attempts to claim that she raised a "constitutional claim[]" within the meaning of 8 U.S.C. 1252(a)(2)(D), the court of appeals found that petitioner waived that claim. See Pet. App. 8a-9a; see also Gov't C.A. Br. 17 n.4 (arguing that petitioner waived any such constitutional claim); Pet. C.A. Br. 8 (claiming "a statutory right to be represented" by effective counsel rather than a constitutional right). In any event, an alien does not have a constitutional right to effective assistance of counsel in removal proceedings. See *In re Compean*, 24 I. & N. Dec. 710, 726 (Att'y Gen. 2009).

See *Kucana*, 533 F.3d at 538. The *Kucana* opinion stated that it had "been circulated * * * to all active judges" and that "[a] majority did not favor a hearing en banc"; the opinion also noted, however, that five judges had voted to rehear the case en banc. *Ibid.*; see Pet. 34 (acknowledging that five judges wished to reconsider question presented en banc). There accordingly is some prospect that the Seventh Circuit may reconsider its ruling on the question presented en banc.

Further, the court below did not have the opportunity to fully consider the government's position on the question presented. The government's brief below did not challenge jurisdiction, and the court did not request supplemental briefing on that issue before holding that it lacked jurisdiction. Although the government did state its view that Section 1252(a)(2)(B)(ii) permits judicial review of a denial of a motion to reopen in supplemental briefing in *Kucana*, the government's analysis rested in large part on the court of appeals' prior decision in *Singh*. See Gov't Supp. Br. at 4-6, *Kucana*, *supra* (No. 07-1002). Because the court of appeals in this case did not have the benefit of the government's position on the question presented, it would be prudent for this Court to decline to address the issue at this time.

There is, moreover, no pressing need for review by this Court, because the issue concerns a narrow aspect of judicial review in the courts of appeals affecting only one procedural feature of the conduct of removal proceedings. The Board's denial of a motion to reopen is reviewable only for abuse of discretion, a highly deferential standard. *INS* v. *Doherty*, 502 U.S. 314, 323 (1992). Under that standard, the court will defer to the Board's ruling unless the ruling inexplicably departs from established policies, was made without rational explanation,

or rested on an impermissible basis. *E.g.*, *Pelinkovic* v. *Ashcroft*, 366 F.3d 532, 536 (7th Cir. 2004).

The question whether such judicial review is available therefore is likely to affect the outcome of very few cases, as this case amply demonstrates: The Board manifestly did not abuse its discretion in denying the motion to reopen here. See pp. 18-20, *infra*. Nor is this case unusual in that respect: In fact, in almost all of the decisions petitioner cites that reviewed the Board's denial of a motion to reopen, see pp. 12-13 & note 4, *supra*, the courts concluded that the Board did not abuse its broad discretion in denying the motion to reopen. See *Miah*, 519 F.3d at 789-790; *Belle*, 2008 WL 4649392, at *1-*2; *Soto*, 2008 WL 4613593, at *1; *Alvarado-Vallardes*, 296 Fed. Appx. at 420-421; *Zequiraj*, 296 Fed. Appx. at 207-208; *Dioubate*, 296 Fed. Appx. at 336; *Baig*, 2008 WL 4573006, at *2-*3; *Zhang*, 543 F.3d at 854-855; *Meda-Morales*, 293 Fed. Appx. at *1; *Sunarno*, 293 Fed. Appx. at 9-11; *Lopez*, 2008 WL 3094052, at *3; *Ali* v. *United States Att'y. Gen.*, 443 F.3d 804, 814 (11th Cir. 2006); *Panjwani*, 401 F.3d at 632-633; *Infanzon*, 386 F.3d at 1362-1364. Review therefore is not warranted at this time.

3. Even if the issue were presently ripe for and warranted this Court's review, this case would be an unsuitable vehicle for resolving it.

a. First, the claim upon which petitioner sought to obtain review in the court of appeals—that the Board abused its discretion in denying her motion to reopen immigration proceedings—is meritless. In her motion to reopen, petitioner argued that her former attorney rendered ineffective assistance by failing to request a hardship waiver of the joint-petition requirement under

8 U.S.C. 1186a(c)(4)(A) and cancellation of removal, and because he failed to file an appellate brief. A.R. 19-20.

The Board denied the motion because it concluded that petitioner had not established prejudice, *i.e.*, that the outcome of the proceedings would have been different if counsel had taken those steps. Pet. App. 12a. With respect to her claim that her attorney should have sought a hardship waiver under 8 U.S.C. 1186a(c)(4)(A) and cancellation of removal, the Board noted that petitioner "offered no evidence in her motion to establish that she would have prevailed if her former attorney had pursued these forms of relief." Pet. App. 12a. Indeed, the Board concluded that the record affirmatively supported the contrary conclusion, because the IJ determined that petitioner "was ineligible for cancellation of removal based on her lack of a qualifying relative." *Id.* at 12a-13a. And the Board determined that petitioner did not make out a claim for reopening based on her attorney's failure to seek a hardship waiver, because "dissatisfaction with her former counsel's strategy in pursuing relief is not grounds for reopening based on ineffective assistance of counsel." *Id.* at 12a.

With respect to her claim that counsel was ineffective for failing to file an appellate brief, the Board observed that it had reviewed the record and rejected her claims on the merits, Pet. App. 13a; it did not dismiss the appeal because counsel failed to file an appellate brief. Although the court of appeals dismissed the petition for review on jurisdictional grounds, it too observed that petitioner failed to demonstrate prejudice, because, for example, "the Board did decide the merits" of petitioner's appeal even though her attorney failed to file a brief. *Id.* at 10a.

It is well-settled that an alien must demonstrate prejudice to justify reopening based upon a claim of ineffective assistance of counsel. See *In re Compean*, 24 I. & N. Dec. at 733-735; see also, *e.g.*, *Mojsilovic* v. *INS*, 156 F.3d 743, 749 (7th Cir. 1998). Petitioner did not argue below that the outcome would have been different with effective counsel; instead, she argued that failure to file an appellate brief is per se prejudicial, Pet. C.A. Br. 9, and that she was eligible for alternative forms of relief, but not that they would be granted, Pet. C.A. Reply Br. 2-6. Even now, petitioner has not explained how the outcome would have been different if not for her attorney's alleged errors. And even if petitioner made out a *prima facie* case for relief, the Board could nonetheless deny her motion to reopen in its broad discretion. See 8 C.F.R. 1003.2(a). There is, accordingly, no reasonable prospect that the court of appeals would conclude that the Board abused its discretion in denying petitioner's motion to reopen.

b. Even if the court of appeals had exercised jurisdiction and granted the motion to reopen, it is extremely unlikely that the Board would grant petitioner the discretionary relief she seeks.

First, it is extremely unlikely that the Board would grant petitioner a waiver of the joint-filing requirement based on a divorce following a bona fide marriage under 8 U.S.C. 1186a(c)(4)(B). Whether to grant or deny such a waiver is entrusted to the discretion of the Attorney General and the Secretary of Homeland Security. See 8 U.S.C. 1186a(c)(4). The Board has already rejected this claim, explaining that petitioner failed to present sufficient evidence to prove her marriage was bona fide. Pet. App. 15a-16a. Indeed, the IJ expressly found that petitioner was not credible, *id.* at 26a, and the Board

upheld that finding, *id.* at 16a. Petitioner has not provided any explanation of what additional evidence she could provide to substantiate her claim that her marriage was bona fide.[6] If she did, it is unlikely the Board would grant her a waiver of the joint-petition requirement, because the Board is not inclined to exercise its discretion favorably when an alien was previously found to have offered incredible testimony to obtain an immigration benefit. See *In re S-Y-G-*, 24 I. & N. Dec. 247, 252 (B.I.A. 2007). Moreover, the fact that petitioner agreed to voluntarily depart the United States and apparently has not departed would be a significant negative factor in the Board's discretionary decision whether to grant Section 1186a(c)(4) relief. See *In re Barocio*, 19 I. & N. Dec. 255, 257-258 (B.I.A. 1985).[7]

Petitioner likewise would be extremely unlikely to prevail on her claim for a discretionary hardship waiver of the joint-petition requirement under 8 U.S.C. 1186a(c)(4)(A). In her motion to reopen before the Board, petitioner advanced no argument and pointed to no evidence suggesting that she had a basis for raising an extreme hardship claim under Section 1186a(c)(4)(A), and she has thus waived that claim. A.R. 18-27; see 8 U.S.C. 1252(d)(1); see also Gov't C.A. Br. 19-21. Even if petitioner were now able to provide evidence of extreme

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[6] Even if petitioner had identified additional evidence, she would further have to establish that it "was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. 1003.2(c)(1).

[7] Although failure to voluntarily depart within the time period permitted makes an alien ineligible for various forms of discretionary relief for a period of ten years, discretionary waiver of the joint-petition requirement is not one of those specified forms of relief. See 8 U.S.C. 1229c(d)(1)(B).

hardship, the most the IJ could do is continue her immigration proceedings in order to allow DHS to consider an application for such a waiver. Pet. C.A. Reply Br. 2 (citing 8 C.F.R. 216.5(f)); see *In re Anderson*, 20 I. & N. Dec. 888, 891-892 (B.I.A. 1994). The IJ is unlikely to exercise his discretion to grant a continuance, and DHS is unlikely to grant a hardship waiver, in light of the IJ's findings regarding petitioner's credibility, her apparent failure to depart the United States as required, and the fact that she has already been granted a continuance to substantiate a waiver claim. Moreover, petitioner appears to be barred from applying for a hardship waiver because a final order of removal has been entered against her. See 8 C.F.R. 216.5(a)(2) ("A conditional resident who is in exclusion, deportation, or removal proceedings may apply for the waiver only until such time as there is a final order of exclusion, deportation or removal."). There is therefore no reasonable prospect that petitioner would be granted a hardship waiver under 8 U.S.C. 1186a(c)(4)(A).

Finally, petitioner has no reasonable prospect of obtaining the discretionary relief of cancellation of removal. As an initial matter, petitioner did not raise any argument regarding cancellation of removal before the court of appeals, and she has thus waived the issue. In any event, the claim lacks merit. The IJ concluded that petitioner was not eligible for that relief because she lacks a spouse, parent, or child to whom her removal would pose a hardship. A.R. 219-224; see 8 U.S.C. 1229b(b)(1)(D). Petitioner has never attempted to explain how she would be eligible for cancellation of removal in light of her inability to satisfy that express statutory requirement. Finally, petitioner is now statutorily ineligible for cancellation of removal because she

overstayed her period of voluntary departure.[8] See 8 U.S.C. 1229c(d)(1)(B) (providing that "if an alien is permitted to depart voluntarily * * * and voluntarily fails to depart * * * within the time period specified, the alien," *inter alia*, "shall be ineligible, for a period of 10 years" to receive cancellation of removal); see 8 C.F.R. 1240.26(a) (same).

Because petitioner is either ineligible for or unlikely to be granted any of the underlying forms of relief that she seeks, this case is not a suitable vehicle for resolving the question whether 8 U.S.C. 1252(a)(2)(B)(ii) precludes judicial review of the denial of a motion to reopen. Further review is therefore unwarranted.

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[8] The Board instructed petitioner on June 2, 2007, that she was required to depart the United States within 60 days. Pet. App. 16a-17a. Petitioner posted her voluntary departure bond with the agency, thereby assuming the "privileges and penalties related to * * * voluntary departure." *In re Diaz-Ruacho*, 24 I. & N. Dec. 47, 50 (B.I.A. 2006). Petitioner has not shown that she departed the United States within the time permitted.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the petition should be granted, the decision below should be vacated, and the case should be remanded for further consideration in light of the government's position stated herein.

Respectfully submitted.

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TERESA JEZIERSKI,

Petitioner,

v.

ERIC H. HOLDER, JR.,
Attorney General of the United States,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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As the petition documented, the refusal of jurisdiction in this case raises two questions on which the courts of appeals are deeply divided: (1) the Seventh Circuit read the Immigration and Nationality Act's jurisdiction-stripping provision, 8 U.S.C. § 1252(a)(2)(B)(ii), to bar judicial review of Board of Immigration Appeals decisions that are not "specified" by Congress "to be in the discretion of the Attorney General," *ibid*, so long as a *regulation* declares them discretionary; and (2) that court also construed the Act's jurisdiction-restoring provision, 8 U.S.C. § 1252(a)(2)(D), as limited to "pure questions" of law.

This Court's intervention, the petition explained, is especially warranted because these legal questions arise with extraordinary frequency in an area of law in which national uniformity is recognized to be of signal importance. Pet. 29-31. Indeed, the statute at issue was enacted to restore uniformity and to provide immigrants facing removal a "day in court," in the face of serious constitutional concerns that denying such review would raise. *Id.* at 5. The petition further explained that the Seventh Circuit's interpretations are wrong and subject individuals to a restrictive jurisdictional gauntlet that Congress did not authorize. *Id.* at 32-33.

Respondent does not contend that the Seventh Circuit resolved either question correctly. On the contrary, he concedes that the "government has concluded" that the Seventh Circuit's construction of the jurisdictional bar is wrong. Opp. 15. Respondent's discussion of the second question presented is reduced to a single footnote, see *id.* at 16 n.5, which offers no defense of the Seventh Circuit's minority view. Likewise, respondent expressly

acknowledges the existence of a broad conflict, *id.* at 11, and he does not deny that Congress and this Court have placed special importance on national uniformity in the administration of this statute.

Respondent nonetheless claims that review "is not warranted at this time," Opp. 16—asserting that it would be "premature," *id.* at 11, for the Court to settle the circuit split in this case; that the "narrow issue[s] of reviewability" presented do not affect enough cases to warrant this Court's attention, *id.* at 16; and that this case is an "unsuitable vehicle," *id.* at 18.

Those purportedly "prudent[ial]," Opp. 17, reasons for withholding review are, upon even passing inspection, little more than a Potemkin Village. The suggestion that the circuit split "may well resolve itself," *id.* at 16, would require one of two startlingly implausible developments: (1) the Seventh Circuit's reversing course "in light of the government's position," *id.* at 24, although that court has expressed its awareness of—and disagreement with—the government's view, has repeatedly and recently reaffirmed its position, and has refused en banc reconsideration, see pp. 3-5, *infra*; or (2) *all the other circuits'* reversing themselves and adopting the interpretation the government recognizes to be wrong. Respondent's suggestion of "narrow" significance, Opp. 16, is likewise insubstantial. The issue of jurisdiction to review denials of reopening recurs constantly in the courts of appeals, and the Seventh Circuit's construction of the statute bars judicial review of still other categories of decisions. See Pet. 19-20. Moreover, the Seventh Circuit's rule is almost invariably consequential, by denying

immigrants the "day in court" respondent concedes Congress provided them.

Respondent's "vehicle" objection rests on a similarly mistaken premise: that this Court's review of outcome-determinative jurisdictional decisions should depend on the likelihood the court below *would have* granted relief had it instead given the individual her lawful day in court. But erroneous denials of judicial review do not become unimportant simply because the standard of review is deferential. This Court should intervene and reverse the judgment below, either summarily or after full argument.

I. The Conceded Conflict Will Not Resolve On Its Own

Respondent's claim that there is "some prospect that the Seventh Circuit may reconsider" its erroneous interpretation on the first question, Opp. 17, rests on the premise that a *minority* of judges voted to rehear en banc the case that overturned circuit precedent adopting Ms. Jezierski's (and the government's) view of the statute. See *ibid.* That inference is, to say the least, highly optimistic. If a minority voted to rehear the case en banc, a *majority* just as surely voted against doing so. And that majority refused over an impassioned and comprehensive dissent, *Kucana* v. *Mukasey*, 533 F.3d 534, 540 (7th Cir. 2008), to reconsider a deeply divided panel decision expressly overruling circuit precedent.

Respondent's assertion that "the court below did not have the opportunity to fully consider the government's position," Opp. 17, is misleading.

Although respondent did not specifically argue his view of the jurisdictional bar within the four corners of his brief, respondent did not dispute jurisdiction. More importantly, the Seventh Circuit has long known the government's position—and has repeatedly rejected it. See, *e.g.*, *Kucana*, 533 F.3d at 537 ("Surprisingly, the Department of Justice argued that § 1252(a)(2)(B)(ii) does not [preclude judicial review of] decisions not to reopen."); *Ali* v. *Gonzales*, 502 F.3d 659, 662 (7th Cir. 2007) ("We have carefully considered the Department's changed position [on 8 U.S.C. § 1252(a)(2)(B)(ii)] and find ourselves unable to agree with it.").

Indeed, respondent's suggestion that this split may resolve itself has only weakened since the last time respondent told this Court that there was "some prospect that the Seventh Circuit may reconsider" its rule. Br. in Opp. at 17, *Gulati* v. *Mukasey*, 128 S. Ct. 1877 (2008) (No. 07-1005). On that occasion, respondent pointed to a pending rehearing submission in *Potdar* v. *Mukasey*, 550 F.3d 594 (7th Cir. 2008). But the court's opinion on rehearing in that case noted that the Seventh Circuit "recently has reaffirmed" its position, citing *Kucana*. See *id.* at 597 n.2; accord Br. in Opp. at 14, *Ali* v. *Mukasey*, 128 S. Ct. 1870 (2008) (No. 07-798) (also asserting "some prospect" and citing *Potdar* petition).

Respondent's remarks on the absence of published opinions in some circuits explicitly addressing the regulatory preclusion theory are puzzling. See Opp. 13 n.4. To the extent this discussion is meant to suggest that the petition exaggerated the character or extent of the circuit conflict, it fails on its face. The petition carefully noted that not all ten circuits that routinely review denials of motions to reopen have

explicitly addressed the (erroneous) § 1252(a)(2)(B)(ii) objection. Pet. 14. The petition also scrupulously explained that these courts' practices are sufficiently settled that their decisions are almost invariably unpublished. Pet. 14 n.1.

To the extent respondent implies that further percolation is warranted, matters get much worse. Respondent would be (1) saying that courts that did *not* accept the restrictive interpretation in the long time the government affirmatively urged it will do so now that the government has *disavowed* that position; and (2) simultaneously urging that respondent's (not-so-recent) reversal of course will catalyze an opposite change in the Seventh Circuit.

II. The Questions Presented Are Undeniably Important

Respondent contends that, despite the conflict and the Seventh Circuit's (resolute) adherence to an erroneous rule, this Court's review is unwarranted because the questions presented involve a "narrow aspect of judicial review," Opp. 17, that "affect[s] the outcome of very few cases," *id.* at 18.

These assertions are truly startling. First, few questions of federal statutory law recur more frequently and widely than the one respondent seeks to minimize. In just the three months since the filing of this petition, the Second Circuit *alone* has decided at least 79 cases challenging denials of motions to reopen and similar motions. See App., *infra*, 1a-8a. And as both Congress and this Court have recognized, the right to reopen is an "important safeguard" to "ensure a proper and lawful disposition," *Dada* v. *Mukasey*, 128 S. Ct. 2307, 2318

(2008), and it is often "the sole means of raising certain [important] issues," *INS* v. *Doherty*, 502 U.S. 314, 331 (1992) (Scalia, J., concurring in the judgment and dissenting in part); see also 8 U.S.C. § 1229a(c)(7).

Respondent's answer—that the erroneous interpretation of 8 U.S.C. § 1252(a)(2)(B)(ii) will not "affect the outcome of many cases" because claims like this one are reviewed under a deferential abuse-of-discretion standard, Opp. 16—is wrong as a matter of law and of fact. The Seventh Circuit's position is almost always outcome-determinative: Petitioners in Ms. Jezierski's position are denied their "day in court" (unless they can satisfy the Seventh Circuit's miserly view of the jurisdiction-restoring provision, see Pet. 23-28). The right to judicial review, however deferential, is no trifle. Congress provided it out of serious constitutional concern. In the context of a system of administrative adjudication that the author of the opinion below elsewhere has described as having "fallen below the minimum standards of legal justice," *Benslimane* v. *Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005) (Posner, J.), it has especially great importance. Judicial review is often the only mechanism available to correct errors having profound, life-altering consequences.

But even on its own terms, respondent's argument is mistaken. In the time respondent took to prepare his brief in opposition, courts of appeals outside the Seventh Circuit issued at least fifteen decisions *granting* relief under the deferential "abuse of discretion" standard respondent maligns. See *Habchy* v. *Filip*, 552 F.3d 911 (8th Cir. 2009); *Chen* v. *Attorney General*, No. 07-3705, 2009 WL 146531 (3d Cir. Jan. 22, 2009); *Bizabishaka* v. *Mukasey*, No. 08-

60191, 2009 WL 139579 (5th Cir. Jan. 21, 2009); *Ogunmowo* v. *Mukasey*, No. 06-71095, 2009 WL 141235 (9th Cir. Jan. 21, 2009); *Liu* v. *Attorney General*, No. 07-3088, 2009 WL 32732 (3d Cir. Jan 7, 2009); *Lyou* v. *Attorney General*, No. 06-3615, 2009 WL 32750 (3d Cir. Jan 7, 2009); *Al Sayar* v. *Mukasey*, No. 08-1597-ag(L), 2009 WL 27687 (2d Cir. Jan. 6, 2009); *Dong* v. *Attorney General*, No. 07-2130, 2009 WL 27430 (3d Cir. Jan 6, 2009); *Lin* v. *Attorney General*, No. 07-2998, 2009 WL 27434 (3d Cir. Jan 6, 2009); *Zhou* v. *Attorney General*, No. 07-3276, 2009 WL 27437 (3d Cir. Jan. 6, 2009); *Donoso-Ortiz* v. *Mukasey*, No. 05-76575, 2008 WL 5395952 (9th Cir. Dec. 26, 2008); *Zheng* v. *Mukasey*, No. 07-5737-ag, 2008 WL 5174773 (2d Cir. Dec. 11, 2008); *Ping Sai Zian* v. *BIA*, No. 05-5152-ag, 2008 WL 5120681 (2d Cir. Dec. 8, 2008); *Zheng* v. *Attorney General*, 549 F.3d 260 (3d Cir. 2008); *Clara-Mendez* v. *Mukasey*, No. 05-74110, 2008 WL 5054332 (9th Cir. Nov. 25, 2008).

Moreover, the Seventh Circuit also has applied its construction of 8 U.S.C. § 1252(a)(2)(B)(ii) to allow the Attorney General to preclude (by mere regulation) review of denials of motions to reconsider and to continue. See *Johnson* v. *Mukasey*, 546 F.3d 403, 403-404 (7th Cir. 2008); *Ali*, 502 F.3d at 660. Indeed, as the petition noted, two circuits that do not recognize regulatory preclusion with respect to denials of reopening paradoxically hold that review of denials of continuances are precluded by regulation. See Pet. 21.

Respondent's bold assertion that these cases "do not shed light on" the question presented here, Opp. 15 n.4, defies logic. Not only is jurisdiction to hear challenges to reconsideration and continuance

denials governed by the same statutory provision, 8 U.S.C. § 1252(a)(2)(D), but decisions on both sides of the split concerning continuances also rely on the same arguments about the meaning of the phrase "specified under this subchapter" that appears in § 1252(a)(2)(B)(ii). See *Kucana*, 533 F. 3d at 536-537 (no review of reopening denial "follows" from construction in *Ali*, which involved continuances); *Alsamhouri* v. *Gonzales*, 484 F.3d 117, 122 (1st Cir. 2007) (describing issue as the "same" in reopening and continuance cases). Tellingly, respondent offers no argument why the same language should apply differently in these contexts.

III. The Entrenched Circuit Conflict Over The Meaning Of The Jurisdiction-Restoring Provision Also Warrants This Court's Review

Respondent musters only a single footnote to address the second question presented in the petition—whether 8 U.S.C. § 1252(a)(2)(D) restores jurisdiction only to review "pure" questions of law. Respondent does not dispute that the courts of appeals are divided on this question, nor does respondent deny the practical and legal importance of the sharply divergent interpretations. Respondent also offers no defense of the Seventh Circuit's interpretation and does not even allude to a "prospect" that the court will reconsider its position on this question. Respondent argues only that, by "agree[ing] that there is jurisdiction over petitioner's claim that the Board abused its discretion in denying her motion to reopen," it has obviated the need for review of this question. Opp. 16 n.5.

Not so. Even if respondent concedes the merits of the first question, this Court should grant review on both questions presented. First, the Court may not agree with the respondent's—and petitioner's—position on the merits of the first question. If it does not, review of the second question will be necessary not only to settle whether judicial review is available in this case, but also to resolve the circuits' conflicting approaches. Second, if the Court agrees with respondent (and petitioner) on the first question, conflict will remain regarding how circuits treat cases presenting "mixed questions" of law and fact in those situations where the jurisdiction-stripping provision *is* operative.

IV. This Case Is An Especially Suitable Vehicle For Resolving The Conflicts Presented

Although respondent asserts that this case is not a "suitable vehicle," Opp. 18, he does not: (1) dispute that the jurisdictional issues dividing the courts of appeals are squarely presented here; (2) identify anything about the facts or procedural posture of this case that would pose an obstacle to the Court's reaching those questions; or (3) suggest how a future case might present the Court with a more developed record for settling the issue. Since the meanings of Sections 1252(a)(2)(B)(ii) and 1252(a)(2)(D) are pure questions of law resolved at the threshold of any case, no court would ever build a more substantial factual record, nor would one be helpful. And respondent does not deny that this case presents the fortuitous opportunity to consider simultaneously the two provisions, which operate interdependently. See Pet. 33-34.

Rather, respondent's "vehicle" claim simply asserts that, had the Seventh Circuit reached the underlying merits, it is "unlikely," Opp. 20-23 (reiterating "unlikely" seven times), that the court would have ruled in her favor. Even if these assertions were credited, nothing would distinguish petitioner's case from many others in which a would-be petitioner bears the burden of persuading a court that an agency abused its discretion. Congress, however, regularly grants such parties judicial review, see 5 U.S.C. §§ 701-706, and this Court protects that right vigilantly. Considerations of efficient judicial administration alone weigh powerfully against litigants' arguing—and this Court's guessing at—the merits in order to choose a vehicle for addressing important, but discrete, jurisdictional issues. The underlying merits are, at this point, irrelevant. No court can reach them without this Court's *first* deciding one or both of the questions presented and reversing the judgment below. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (looking at merits before establishing jurisdiction "carries the courts beyond the bounds of authorized judicial action").[1]

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[1] Respondent's offhand allusion to a "bar[to] judicial review of the underlying order," Opp. 14, is a chimera. The courts of appeals do review orders concerning waiver denials and cancellation of removal. See, *e.g.*, *Pohan* v. *Mukasey*, 266 Fed. Appx. 786, 787 n.1 (10th Cir. 2008); *Cho* v. *Gonzales*, 404 F.3d 96, 102 (1st Cir. 2005); *Gutierrez* v. *Mukasey*, 273 Fed. Appx. 596, 598 (9th Cir. 2008). But the argument fails for a more basic reason. Even if jurisdiction to review such orders were in doubt, in this case there *were no such underlying orders*. The reason petitioner seeks to reopen her case is because her attorney *failed* to seek relief under Sections 1186a(c)(4)(A) and 1229b(b). See generally *Guerra-Soto* v. *Ashcroft*, 397 F.3d 637,

Finally, while respondent unsurprisingly depicts Ms. Jezierski's case in a relentlessly negative light, he does not dispute (nor did the BIA) that she was represented by an attorney who, after taking a substantial sum of money, failed to file any appellate brief whatsoever. To the extent respondent's (legally irrelevant) merits argument impugns petitioner personally, it bears emphasis that Ms. Jezierski entered the country lawfully, paid taxes, violated no criminal law, was victimized—first by her husband and then by an attorney on whom she depended—and seeks to remain in the country to continue providing care to an aging close relative.

V. Reversal, Not Vacatur, Is The Proper Summary Disposition

Respondent's fall-back position—that, instead of granting certiorari and reversing the judgment below, this Court should vacate the Seventh Circuit's judgment and remand for "further consideration in light of the government's position," Opp. 11, 24—makes no sense at all. As explained above, this is not a case "[w]here intervening developments, or recent developments that [there is] reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the

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640 (8th Cir. 2005) ("[The] petition simply asks us to review the BIA's refusal to reopen a case which, if it had been reopened, would have resulted in the Attorney General deciding whether to grant a form of discretionary relief. Section 1252(a)(2)(B)(i) would have prohibited our review only if the case had been reopened, and discretionary relief had actually been denied. This case never got that far, and thus we have jurisdiction to review the BIA's decision for an abuse of discretion.").

opportunity for further consideration." *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam). On the contrary, the Seventh Circuit was well aware of the government's position when it decided this case and has repeatedly made clear that it rejects that position. See pp. 3-4, *supra*. The questions presented here warrant full review, but should the Court wish to dispose of the case summarily, reversal—not vacatur—would be the proper course in light of the government's concession that the basis of the decision below was legally erroneous.

CONCLUSION

The petition for a writ of certiorari should be granted or the judgment below summarily reversed.

Respectfully submitted.

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APPENDIX

Second Circuit Cases Citing Jurisdiction-Stripping Provision

Denying motions to reopen, motions to reconsider, motions for continuance, or other similar motions:

1. *Shi* v. *Bd. of Immigration Appeals*, No. 05-2443-ag., 2009 WL 427314 (2d Cir. Feb. 23, 2009) (motion to reopen).
2. *Zheng* v. *Holder*, No. 08-1755-ag., 2009 WL 394296 (2d Cir. Feb. 18, 2009) (motion to reopen).
3. *Wang* v. *Holder*, No. 08-05620-ag., 2009 WL 394427 (2d Cir. Feb. 18, 2009) (motion to reopen).
4. *Li* v. *Holder*, No. 08-2695-ag., 2009 WL 394679 (2d Cir. Feb. 18, 2009) (motion to reopen).
5. *Dong* v. *Holder*, No. 08-3286-ag, 2009 WL 319748 (2d Cir. Feb. 10, 2009) (motion to reopen).
6. *Wu* v. *Holder*, No. 08-2213-ag, 2009 WL 289850 (2d Cir. Feb. 6, 2009) (motion to reopen).
7. *Chen* v. *Holder*, No. 07-5571-ag, 2009 WL 270044 (2d Cir. Feb. 5, 2009) (motion to reopen).
8. *Dong* v. *Filip*, No. 08-0092-ag, 2009 WL 229859 (2d Cir. Feb. 2, 2009) (motion to reopen).
9. *Zhang* v. *Filip*, No. 06-3719-ag, 2009 WL 229861 (2d Cir. Jan. 30, 2009) (motion to reopen).
10. *Liao* v. *Filip*, No. 08-2844-ag, 2009 WL 229951 (2d Cir. Jan. 30, 2009) (motion to reconsider).

11. *Chang* v. *Filip*, No. 08-2552-ag, 2009 WL 229961 (2d Cir. Jan. 30, 2009) (motion to reopen).
12. *Khatun* v. *Filip*, No. 07-5527-ag, 2009 WL 229963 (2d Cir. Jan. 30, 2009) (motion to reconsider).
13. *Lin* v. *Filip*, No. 07-4526-ag, 2009 WL 230040 (2d Cir. Jan. 30, 2009) (motion to reopen).
14. *Li* v. *Filip*, No. 07-4949-ag, 2009 WL 197565 (2d Cir. Jan. 29, 2009) (motion to reopen).
15. *Xu* v. *Filip*, No. 07-4312-ag, 2009 WL 190395 (2d Cir. Jan. 28, 2009) (motion to reopen).
16. *Li* v. *Filip*, No. 08-0528-ag, 2009 WL 190401 (2d Cir. Jan. 28, 2009) (motion to reopen).
17. *Ye* v. *Filip*, No. 06-1535-ag, 2009 WL 190402 (2d Cir. Jan. 28, 2009) (motion to reopen and motion to reconsider).
18. *Lian* v. *Filip*, No. 07-5152-ag, 2009 WL 180296 (2d Cir. Jan. 27, 2009) (motion to reopen).
19. *Khatun* v. *Filip*, No. 08-0493-ag, 2009 WL 180297 (2d Cir. Jan. 27, 2009) (motion to reopen).
20. *Chen* v. *Bureau of Citizenship and Immigration Servs.*, No. 06-4075-ag, 2009 WL 180299 (2d Cir. Jan. 27, 2009) (motion to reopen).
21. *Sow* v. *Dep't of Homeland Sec.*, No. 07-5303-ag, 2009 WL 180302 (2d Cir. Jan. 27, 2009) (motion to reopen).
22. *Gorvokovic* v. *Filip*, No. 08-0463-ag, 2009 WL 166534 (2d Cir. Jan. 26, 2009) (motion to reopen).

23. *Yang* v. *Bureau of Citizenship and Immigration Servs.*, No. 06-4321-ag, 2009 WL 166540 (2d Cir. Jan. 26, 2009) (motion to reopen).
24. *Zhang* v. *Mukasey*, No. 08-2036-ag, 2009 WL 106333 (2d Cir. Jan. 16, 2009) (motion to reopen).
25. *Zhao* v. *Mukasey*, No. 08-1982-ag, 2009 WL 82878 (2d Cir. Jan. 14, 2009) (motion to reconsider).
26. *Huang* v. *Mukasey*, No. 07-4052-ag, 2009 WL 82880 (2d Cir. Jan. 14, 2009) (motion to reopen).
27. *Jiang* v. *Mukasey*, No. 07-4876-ag, 2009 WL 76519 (2d Cir. Jan. 13, 2009) (motion to reopen).
28. *Chen* v. *Mukasey*, No. 07-5786-ag, 2009 WL 76520 (2d Cir. Jan. 13, 2009) (motion to reopen).
29. *Sadiki* v. *Mukasey*, No. 08-0722-ag, 2009 WL 76521 (2d Cir. Jan. 13, 2009) (motion to reopen).
30. *Pan* v. *Mukasey*, No. 08-2655-ag, 2009 WL 59170 (2d Cir. Jan. 12, 2009) (motion to reopen).
31. *Chen* v. *Mukasey*, No. 08-2874-ag, 2009 WL 51998 (2d Cir. Jan. 9, 2009) (motion to reopen).
32. *Haryanto* v. *Mukasey*, No. 07-2810-ag, 2009 WL 52059 (2d Cir. Jan. 9, 2009) (motion to reopen).
33. *Gashi* v. *Mukasey*, Nos. 06-5662-ag(L), 07-3445-ag(Con), 2009 WL 52061 (2d Cir. Jan. 9, 2009) (motion to reopen).

34. *Zhu* v. *Mukasey*, No. 08-0647-ag, 2009 WL 39086 (2d Cir. Jan. 8, 2009) (motion to reopen).
35. *Zheng* v. *Mukasey*, No. 07-5675-ag, 2009 WL 39092 (2d Cir. Jan. 8, 2009) (motion to reopen).
36. *Gao* v. *Mukasey*, No. 05-4888-ag, 2009 WL 39095 (2d Cir. Jan. 8, 2009) (motion to reopen).
37. *Ouyoung* v. *Mukasey*, No. 07-3867-ag, 2009 WL 39248 (2d Cir. Jan. 8, 2009) (motion to reopen).
38. *Chen* v. *Mukasey*, No. 08-0741-ag, 2009 WL 39303 (2d Cir. Jan. 8, 2009) (motion to reissue).
39. *Tang* v. *Mukasey*, No. 08-2698-ag, 2009 WL 39309 (2d Cir. Jan. 8, 2009) (motion to reopen).
40. *Chen* v. *Mukasey*, No. 06-3026-ag, 2009 WL 39312 (2d Cir. Jan. 8, 2009) (motion to reopen).
41. *Abdulali* v. *U.S. Dep't of Justice*, Nos. 06-5519-ag (L), 07-2976-ag (con), 2009 WL 46890 (2d Cir. Jan, 8, 2009) (motion to reopen and motion to reconsider).
42. *Wu* v. *Mukasey*, No. 08-1656-ag, 2009 WL 27693 (2d Cir. Jan. 6, 2009) (motion to reopen).
43. *Wang* v. *Mukasey*, No. 08-1701-ag, 2009 WL 27696 (2d Cir. Jan. 6, 2009) (motion to reopen).
44. *Zhao* v. *Mukasey*, No. 08-2106-ag, 2008 WL 5411088 (2d Cir. Dec. 30, 2008) (motion to remand).

45. *Jiang* v. *Mukasey*, No. 07-5374-ag, 2008 WL 5381231 (2d Cir. Dec. 23, 2008) (motion to reopen).
46. *Subekti* v. *Mukasey*, No. 08-1204-ag, 2008 WL 5268607 (2d Cir. Dec. 19, 2008) (motion to reopen).
47. *Chen* v. *Mukasey*, No. 08-0694-ag, 2008 WL 5268616 (2d Cir. Dec. 19, 2008) (motion to reopen).
48. *Zhao* v. *Mukasey*, No. 08-2513-ag, 2008 WL 5269858 (2d Cir. Dec. 19, 2008) (motion to reopen).
49. *Guo* v. *Mukasey*, No. 08-1234-ag, 2008 WL 5269876 (2d Cir. Dec. 19, 2008) (motion to reopen).
50. *Zheng* v. *Mukasey*, No. 08-0461-ag, 2008 WL 5244448 (2d Cir. Dec. 17, 2008) (motion to reopen).
51. *Zhang* v. *Mukasey*, No. 07-5055-ag, 2008 WL 5268608 (2d Cir. Dec. 15, 2008) (motion to reopen).
52. *Chen* v. *Mukasey*, No. 07-3977-ag, 2008 WL 5174646 (2d Cir. Dec. 11, 2008) (motion to reopen).
53. *Basnet* v. *Mukasey*, Nos. 07-4239-ag(L), 08-0593-ag(Con), WL 5160154 (2d Cir. Dec. 10, 2008) (motion to reopen).
54. *Zou* v. *Mukasey*, No. 07-5458-ag, 2008 WL 5160161 (2d Cir. Dec. 10, 2008) (motion to reopen).
55. *Qosaj* v. *Mukasey*, No. 08-1185-ag, 2008 WL 5160164 (2d Cir. Dec. 10, 2008) (motion to reopen).

56. *Papa* v. *Mukasey*, Nos. 04-4221-ag (L), 08-0495-ag (Con), 2008 WL 5160167 (2d Cir. Dec. 10, 2008) (motion to reopen).
57. *Zheng* v. *Mukasey*, No. 07-3578-ag, 2008 WL 5160168 (2d Cir. Dec. 10, 2008) (motion to reopen).
58. *Mangar* v. *Mukasey*, Nos. 07-5457-ag (L), 08-1344-ag (Con), 2008 WL 5160171 (2d Cir. Dec. 10, 2008) (motion to reopen and motion to reconsider)
59. *Sun* v. *United States Dep't of Justice*, No. 08-0254-ag, 2008 WL 5120618 (2d Cir. Dec. 8, 2008) (motion to reopen).
60. *Lin* v. *Mukasey*, No. 08-1606-ag, 2008 WL 5110982 (2d Cir. Dec. 5, 2008) (motion to reopen).
61. *Chen* v. *Mukasey*, No. 07-3376-ag, 2008 WL 5110985 (2d Cir. Dec. 5, 2008) (motion to reopen).
62. *Lin* v. *United States Attorney Gen.*, No. 07-5762-ag, 2008 WL 5110986 (2d Cir. Dec. 5, 2008) (motion to reopen).
63. *Huang* v. *Bd. of Immigration Appeals*, No. 06-2523-ag, 2008 WL 5110990 (2d Cir. Dec. 5, 2008) (motion to reopen).
64. *Lian* v. *Mukasey*, No. 08-1641-ag, 2008 WL 5100187 (2d Cir. Dec. 4, 2008) (motion to reopen).
65. *Moe* v. *Mukasey*, No. 07-0501-ag, 2008 WL 5082994 (2d Cir. Dec. 2, 2008) (motion to reopen and motion for continuance).
66. *Sherpa* v. *Mukasey*, No. 08-1737-ag, 2008 WL 5082986 (2d Cir. Dec. 1, 2008) (motion to reopen).

67. *Chen* v. *Mukasey*, No. 07-5139-ag, 2008 WL 5063297 (2d Cir. Nov. 25, 2008) (motion to reopen).
68. *Gill* v. *Mukasey*, No. 07-2256-ag, 2008 WL 5063818 (2d Cir. Nov. 25, 2008) (motion to reopen).
69. *Singh* v. *Bd. of Immigration Appeals*, No. 03-4914-ag, 2008 WL 5063843 (2d Cir. Nov. 25, 2008) (motion to reopen).
70. *Xiao* v. *Mukasey*, No. 08-0563-ag, 2008 WL 5063134 (2d Cir. Nov. 24, 2008) (motion to reopen).
71. *Zhang* v. *Mukasey*, No. 08-2349-ag, 2008 WL 4911435 (2d Cir. Nov. 18, 2008) (motion to reopen).
72. *Sarkar* v. *Mukasey*, No. 07-2686-ag, 2008 WL 4911436 (2d Cir. Nov. 18, 2008) (motion to reopen).
73. *Velazquez-Jimenez* v. *Mukasey*, No. 08-0450-ag, 2008 WL 4950672 (2d Cir. Nov. 20, 2008) (motion for adjournment).
74. *Moe* v. *Mukasey*, No. 07-0501-ag, 2008 WL 5082994 (2d Cir. Dec. 2, 2008) (motion to reopen and motion for continuance).

Granting petition for review, vacating judgment, and remanding to BIA:

1. *Mignano* v. *Filip*, No. 07-5663-ag, 2009 WL 159274 (2d Cir. Jan. 23, 2009) (motion to reopen).
2. *Ghoniem* v. *Mukasey*, No. 06-5455-ag, 2009 WL 27702 (2d Cir. Jan. 6, 2009) (motion for continuance).
3. *Al Sayar* v. *Mukasey*, Nos. 08-1597-ag(L), 08-2066-ag(Con), 2009 WL 27687 (2d Cir. Jan. 6, 2009) (motion to reopen).
4. *Zheng* v. *Mukasey*, No. 07-5737-ag, 2008 WL 5174773 (2d Cir. Dec. 11, 2008) (motion to remand granted in part).
5. *Zian* v. *Bd. of Immigration Appeals*, No. 05-5152-ag, 2008 WL 5120681 (2d Cir. Dec. 8, 2008) (motion to reopen).